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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

October Term, 1953

No. 68, 14

UNITED STATES OF AMERICA, PETITIONER

vs.

[illegible] W. CAPPS, ETC.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 14, 1953

CERTIORARI GRANTED NOVEMBER 23, 1953

INDEX TO APPENDIX

	Page
Complaint	1
Answer	4
Motion to dismiss	9
Memorandum of court on denying motion to dismiss	13
Transcript of trial	16
Witnesses:	
Sidney S. Jones	17
Vernon K. Gimson	25
David B. Ward	31
Sidney S. Jones (recalled)	37
J. A. Ziegler (by deposition)	40
George R. Grange	67
Court's decision	147
Exhibits	
1. Invoice H. B. Willis Co., to Guy W. Capps, Inc.	17, 150
2. Telegram, Guy W. Capps, Inc., to H. B. Willis Co.	18, 151
3. Invoice, Guy W. Capps, Inc., to Atlantic Commission Company	21, 151
4. List of Guy W. Capps, Inc., resales	63, 152
5. Executive agreement, November 23, 1948	64, 152
6. Weighted average farm support price	86, 157
11. Freight invoice, H. B. Willis Co. to Guy W. Capps, Inc.	139, 158
Deposition exhibit (compilation of sales of cargo by Atlantic Commission Company)	47, 159
Judgment	162
Proceedings in the U. S. C. A. for the Fourth Circuit	163
Argument and submission	163
Opinion, Parker, J.	164
Judgment	170
Stipulation re printing of the record	171
Clerk's certificate	172
Order extending time to file petition for writ of certiorari	173
Order granting certiorari	175

281696—53

sacked and loaded f. o. b. carrier at country shipping points.

5. On November 23, 1948, the United States, having ascertained that potatoes harvested in Canada were being exported to the United States in increasing quantities and that the potatoes so imported increased the surplus of potatoes offered for sale to the Department of Agriculture under the potato price support program, entered into an agreement with the Canadian Government to prevent the importation of Canadian potatoes into the United States for table stock, that is, for human consumption. This agreement was terminated on June 20, 1949. Copies of the notes exchanged between the Canadian Ambassador and the Acting Secretary of the United States of America, constituting said agreement of November 23, 1948, are included in the copy of "Treaties and Other International Acts Series 1896," attached hereto as Exhibit A.

6. Under said agreement of November 23, 1948, the Canadian Government agreed to:

> 1. Include Irish potatoes in the list of commodities for which an export permit is required under the provisions of the Export and Import Permits Act.
>
> 2. Withhold export permits for the movement of table stock potatoes to the United States proper, excluding Alaska.
>
> 3. Issue export permits for the shipment of Canadian certified seed potatoes to the United States, but only under the following circumstances:
>
> (a) Export permits will be issued to Canadian exporters for shipments to specified States in the United States and such permits will only be granted within the structure of a specific schedule. The schedule is designed to direct the shipment of Canadian certified seed

potatoes into those States where there is a legitimate demand for certified seed potatoes and only during a short period immediately prior to the normal seeding time. A draft of this schedule is now being jointly prepared by Canadian and United States officials.

(b) Export permits would only be granted to Canadian exporters who could give evidence that they had firm orders from legitimate United States users of Canadian seed potatoes. Canadian exporters would also be required to have included in any contract into which they might enter with a United States seed potato importer a clause in which the importer would give an assurance that the potatoes would not be diverted or reconsigned for table stock purposes.

(c) The Canadian Government would survey the supply of Canadian certified seed potatoes by class and consider the possibility of giving precedence to the export of Foundation and Foundation A classes of certified seed.

7. Upon information and belief, in December 1948 the defendant purchased, from H. B. Willis, Inc., Charlottetown, Prince Edward Island, Canada, 48,544 sacks of 100 pounds each of Canadian certified Irish seed potatoes. These potatoes were shipped to the defendant on the S. S. *Empire Gangway*, docking at Jacksonville, Florida, in January 1949. The defendant included in his contract of purchase the following clause, "Certified seed potatoes loaded on S. S. *Gangway* are for planting in Florida and Georgia." The defendant's agreement that these seed potatoes will be used for planting was made with knowledge of the agreement between the United States and Canada dated November 23, 1948, and was made for the benefit of the United States.

8. Upon information and belief, in January 1949 the defendant, notwithstanding said contract and in

violation thereof, sold the 48,544 sacks of seed potatoes for table stock purposes.

9. The sale of said potatoes by the defendant has damaged the United States in the amount of approximately one hundred fifty thousand four hundred and eighty-six dollars ($150,486.00), in that for each quantity of potatoes so imported from Canada and sold for table stock in the United States, a substantially equivalent quantity of potatoes produced in the United States was offered for sale to the Department of Agriculture, and had to be and was purchased by the Department under the Agricultural Act of 1948.

Wherefore, the plaintiff demands judgment against the defendant in the sum of one hundred fifty thousand four hundred and eighty-six dollars ($150,486.00), together with the costs of suit herein incurred.

(S) GEORGE R. HUMBRICKHOUSE,
United States Attorney.

(S) JOHN P. HARPER,
Assistant United States Attorney.

ANSWER BY DEFENDANT

For answer to the complaint in the above-captioned matter, defendant says:

FIRST DEFENSE

The jurisdiction of the Court is denied upon the grounds set up in defendant's motion to dismiss for failure to state a claim upon which relief can be granted, and those grounds are incorporated herein by reference as fully as if again set forth in extenso.

The corporate status of the defendant and the location of its principal office are admitted.

SECOND DEFENSE

The defendant is without sufficient knowledge to either affirm or deny the allegations of Paragraph 3 of the complaint concerning the alleged duty of the Department of Agriculture to support the price level of Irish (white) potatoes; but said defendant asserts that whether such is fact or not it creates no liability on this defendant and is no foundation for any action by plaintiff against it.

THIRD DEFENSE

The defendant is without sufficient information to either affirm or deny the allegations of Paragraph 4 of the complaint that in December 1948 and January, February, and March 1949, the Department of Agriculture stood ready to purchase and did purchase all eligible Irish potatoes offered by any eligible vendor, and the allegations of said Paragraph 4 concerning what the support price was at such times; but said defendant asserts that the allegations of said Paragraph 4 are wholly irrelevant to any supposed cause of action in favor of plaintiff against this defendant, and they furnish no basis for a claim in favor of plaintiff against this defendant.

FOURTH DEFENSE

Defendant is without sufficient information to either affirm or deny the allegations of Paragraph 5 of the complaint, but it denies that any exchange of notes between the Canadian Ambassador and the Acting Secretary of the United States of America have any validity in law or furnish any foundation for a claim against it by this plaintiff.

FIFTH DEFENSE

Defendant is without sufficient knowledge to affirm or deny what the Canadian Government agreed to as alleged in Paragraph 6 of the complaint; but it denies that any agreement by the Canadian Government is operative upon this defendant or furnishes any foundation for a claim against it by this plaintiff; and it denies that the Canadian Government has made any agreement which will be recognized under the laws of the United States as effective upon any citizens of the United States.

SIXTH DEFENSE

The defendant admits that in December, 1948, it purchased 48,544 sacks of 100 pounds each of Canadian certified Irish seed potatoes from H. B. Willis, Inc., of Charlottetown, Prince Edward Island, Canada, and that said potatoes were shipped on the S. S. *Empire Gangway*, consigned to this defendant at Jacksonville, Florida. The defendant denies that as a part of said contract it ever promised or undertook that said potatoes would be planted by it in Florida and Georgia. The defendant denies that it was ever intended by said Willis, the seller, or by it as the purchaser that this defendant should undertake to said Willis, or bind itself to said Willis, that such potatoes would ultimately be planted in Florida and Georgia. This defendant denies that any such undertaking or promise by this defendant was a covenant or condition or a contract provision between said Willis and said defendant. Defendant denies that when it purchased these seed potatoes it knew of what the complaint calls "the agreement between the United States and Canada dated November 23, 1948," but further states that it had heard that Canadian exporters of

potatoes were required to state whether potatoes which they desired to ship were sold as seed potatoes. Defendant denies that the contract between said Willis and said defendant or any provision thereof was for the benefit of the plaintiff, or that the plaintiff was a party to such contract or that the plaintiff acquired any rights under such contract.

This defendant asserts that it was well known to the contracting parties that this defendant was a dealer in potatoes who customarily bought potatoes in Canada for resale, and that it was the belief of the contracting parties that this defendant intended to and would resell this particular shipment of potatoes to others; this defendant says that after it had purchased the said 48,544 sacks of Canadian certified seed potatoes from said Willis, said Willis inquired of it as to the prospective use to which said potatoes would ultimately be put, and this defendant advised said Willis in good faith that it expected said potatoes would be planted in Florida and Georgia; and that this defendant then supposed that the ultimate owners of said potatoes would desire to plant said potatoes in Florida and Georgia.

SEVENTH DEFENSE

This defendant denies that it sold the 48,544 sacks of seed potatoes for table stock purposes, and it asserts that it sold said potatoes as Canadian certified seed potatoes usable for planting purposes.

EIGHTH DEFENSE

Defendant denies that plaintiff has been damaged as is alleged in the complaint, the defendant denies that plaintiff has sustained any damages whatever; defendant denies that plaintiff has any cause of action

against it; and defendant denies that the complaint states a claim upon which relief can be granted.

Defendant says that having resold the whole quantity of said potatoes it does not and cannot know the use to which said potatoes or any part of them were put by the ultimate owners but it is obvious that if said potatoes were ultimately used for seed, then as a consequence of such use, and since the average yield is at least ten for one, the result of such use would be to cause approximately 485,440 sacks of potatoes to be produced in the United States, which quantity would have been subject to offer for sale to and purchase by the Department of Agriculture. Conversely stated, if plaintiff's theory that all of said potatoes were ultimately used as table stock and consumed as food, is fact then the plaintiff was liable to the obligation to purchase only one-tenth as many potatoes as it was liable to the obligation to purchase if all of said potatoes were planted as seed in Florida and Georgia and the results of such planting were harvested in the normal potato crop year in those states.

Wherefore, defendant demands that the Court discharge defendant from all liability in the premises and award to the defendant its costs and attorney's fees.

W. R. Ashburn,
Of Counsel for Defendant.

Ashburn, Agelasto, and Sellers,
502 Citizens Bank Building, Norfolk, Virginia
Attorneys for Defendant.

I, W. R. Ashburn, of counsel for the defendant Guy W. Capps, Inc., do certify that a copy of the foregoing answer was served on plaintiff's attorneys by mailing such copy directed to George R. Humriekhouse, United

States District Attorney, at Federal Building, Norfolk, Virginia, on January 31st, 1951.

W. R. ASHBURN.

Defendant demands trial by jury.

ASHBURN, AGELASTO AND SELLERS,
Its Attorneys.

MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

The defendant Guy W. Capps, Inc., by its attorneys, moves the Court to dismiss the complaint and this action for failure to state a claim upon which relief can be granted, pursuant to the provisions of Civil Procedure Rule 11 (b), and as grounds for such motion respectfully sets forth the following:

1. The complaint alleges that this action is brought and the jurisdiction of this Court is invoked under Title 28, United States Code, Section 1345, but such statute does no more than confer original jurisdiction on the District Courts in cases where the United States or some agency or officer thereof is authorized by law to bring an action. The United States of America, in its governmental capacity, has no power nor authority to attempt to collect any money from any of its citizens (including the defendant) by action at law for damages or in any other manner or through any other course or demand, except as the Constitution of the United States or some statute or law serves as the foundation for its claim and the foundation of the authority of the officer or agency making the decision to bring action, to authorize the institution of the action in the name of the United States.

The defendant contends and here asserts on information and belief that neither the Constitution nor any statute or law authorizes the institution of

this action, and that none authorizes any officer or agency of the United States to make a decision directing either the institution or the maintenance of this action; and the defendant asserts that this action has no standing in law and the Court is without jurisdiction to entertain it.

2. The complaint asserts a supposed agreement of November 23rd, 1948, between the United States and the Dominion of Canada as the foundation for the right of the plaintiff to bring this action, and said supposed agreement is alleged to have been made by an exchange of notes between the Canadian Ambassador and the Secretary of State of the United States, and said notes there referred to are filed with the complaint as a part thereof as Exhibit A therewith.

The Government of the United States is a government of limited powers, and neither the Constitution nor laws of the United States authorize the making of an "agreement" with another sovereign power in any manner such as is alleged in the complaint, and said supposed agreement is invalid for any purpose and void and it is no agremeent in law, and it cannot serve as the foundation for a right of action in favor of the United States of America against this defendant.

3. It is apparent upon the face of the complaint that the language quoted in such complaint in Paragraph numbered 7 thereof, "Certified seed potatoes loaded on S. S. *Gangway* are for planting in Florida and Georgia," was not a covenant, nor condition, of the transaction of sale and purchase, nor a contract provision, which constituted a part of the agreement between H. B. Willis, Inc., of Charlottetown, Prince Edward Island, Canada, as seller of the 48,544 sacks

or potatoes referred to in the complaint, and Guy W. Capps, Inc., as purchaser of said potatoes; it is further apparent on the face of the complaint that if this language was used between the seller and purchaser of such potatoes, then such language constituted no more than a recital of this defendant's belief as to the use to which the commodity already purchased by the defendant would ultimately be put, and it is apparent that the parties to the transaction did not intend that such language should constitute an undertaking by the defendant to itself put such commodity to such use. The use of such language would not support an action against this defendant by H. B. Willis, Inc., and, therefore, it cannot support an action against this defendant by the plaintiff United States of America.

4. The complaint alleges a supposed contract between H. B. Willis, Inc., of Charlottetown, Prince Edward Island, Canada as seller, and Guy W. Capps, Inc., as purchaser, and it is apparent from the face of the complaint that this plaintiff United States of America was not a party to such transaction or contract of sale, but the complaint alleges in Paragraph 7 thereof that the contract was made for the benefit of the United States. As to this allegation, it is apparent from the face of the complaint that plaintiff was neither a "donee beneficiary" of said Willis as the promisee, nor a "Creditor beneficiary" of such promises, as these terms are known to the law, but at most said United States of America was no more than an "incidental beneficiary" of the promisee, and as such it cannot maintain an action for an alleged breach of said contract.

5. This is an action ex delicto brought by the United States of America as a third party not a contracting party in any agreement between H. B. Willis, Inc.,

and Guy W. Capps, Inc. It is a well settled principle of law that a third party cannot maintain an action ex delicto for injuries resulting from a breach of contract between two other contracting parties, unless such third party sustains injuries from such breach for which he would have a right of action although no such contract had been made. Plaintiff does not come within this rule, and its complaint shows on its face that it would have no right of action against this defendant unless said supposed contract between this defendant and H. B. Willis, Inc., had been made.

6. The complaint shows on its face that the damages claimed by the plaintiff are not a consequence flowing from the contract of sale and purchase between H. B. Willis Inc., of Charlottetown, Prince Edward Island, Canada as seller and Guy W. Capps, Inc., as purchaser, whether the terms of such contract have been observed or breached. Without admitting, but expressly denying, that the 48,544 sacks of seed potatoes referred to in the complaint were sold by this defendant for table stock purposes, yet it is apparent from the complaint that if they were not ultimately used for seed, nevertheless such fact did not cause a substantially equivalent quantity to be purchased by the Department of Agriculture.

It is further apparent on the face of the complaint that the damages claimed there are speculative, conjectural and not alleged on any basis known to the law nor on any basis which would support a recovery by the plaintiff.

7. The price support program of the Department of Agriculture as stated in the complaint has, under the laws of the United States of which this Court will take judicial notice, been carried on with monies derived from the collection of taxes, and for any such

monies so expended by the plaintiff there is no warrant nor authority in law for their recovery by an action of this nature.

Wherefore, defendant moves the Court to dismiss this action.

W. R. ASHBURN,
Of Counsel for the Defendant.

MEMORANDUM BY THE COURT

In December 1948, the defendant purchased some 48,000 sacks of Irish potatoes from a Canadian exporter for shipment to the United States, and included in its contract, so as to comply with a Canadian embargo on table potatoes imposed by agreement with the United States, a statement that the potatoes were "for planting in Florida and Georgia"; but, further avers the complaint, after the importation early in 1949 the defendant breached its contract, to the injury of the United States, by selling the potatoes for table stock purposes, and thus forced the Government in its support program [1] of agricultural commodities to buy an equivalent quantity of table potatoes at an outlay of $150,486.00, the sum in which it now seeks damages of the defendant importer.

By motion to dismiss the defendant urges the invalidity of the international agreement, denies the statement to be of any obligatory force, denies any right in the Government to sue, and holds the damages to be no more than theoretical.

A month before the shipment, through an exchange of diplomatic notes, Canada had covenanted with the United States that, in view of the disjointing effect

[1] Agricultural Act of 1948, Public Law 987, 80th Congress; 62 Stat. 1247.

which the unrestrained export of potatoes from Canada to the United States would have upon the price support of potatoes by the United States, she would withhold export permits for the movement of table stock potatoes to the United States, and would allow export of seed potatoes on purchase by a United States importer only on condition that the contract of purchase include an assurance *by the importer* that the potatoes would not be diverted or reconsigned for table stock purposes.

Though not a treaty, the United States-Canada agreement nevertheless had the force of law. It was an Executive Agreement.[2] Long has it been recognized that the President through his Secretary of State or other representative may, without the authorization or approval of the Congress, enter into commercial compacts.[3] Even assuming that it could do so, the Congress did not, as the defendant argues, by the Agricultural Act of 1948[4] or by the Tariff Act of 1930,[5] as amended, curtail this reach of Executive authority.

True, the first of these Acts continued price support into 1949, and explicitly directed how the President might limit the entry of farm produce when he believed their import was injuring the support plan. Likewise the Tariff Act outlines the method for formulating international trade agreements to reduce imports. The present agreement conforms to neither prescription. However, their terms disclose that each of these Acts purposed only a control of the Executive's stewardship of the Con-

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[2] *United States* v. *Pink*, 315 U. S. 203, 229.

[3] *United States* v. *Curtiss-Wright*, 299 U. S. 304; *U. S.* v. *Belmont*, 301 U. S. 324, 330.

[4] Public Law 987, 80th Congress; 62 Stat. 1247.

[5] 19 U. S. C. A. 1351 *et seq.*

gressional power to regulate foreign commerce, which had been delegated through those Acts to the President. In them is found no design to rein the President's international bargaining powers. Moreover, when the Congress in adopting a program invests the President with means to protect it, he is not thereby ousted of any ex officio prerogative also adaptable to preserve the program. His power remains independently, though complementary and coordinate with the legislative scheme.*

We conclude too that, on the pleadings, the statement in the purchase contract is in effect an assurance by the defendant against diversion of the seed potatoes. The complaint avers the defendant's awareness of the trade agreement at the time of his purchase. Except to raise the embargo, there was no call for the clause "Certified seed potatoes loaded on S. S. *Gangway* are for planting in Florida and Georgia" in the contract. In these environs the words clearly mean that the potatoes would be used for seed only, and as a subscriber or acceptor of the contract, the defendant vouched that declaration as its promise. "Florida and Georgia" were added in obedience to the trade agreement's exaction that export permits issue only for specified States.

Undoubtedly the United States has the right to sue on this promise. The Government is the direct and lone beneficiary of the pledge against diversion. Inclusion of the promise in the contract advantaged the exporter and importer—by lifting the embargo—but the promise intrinsically benefited only the United States. Indeed, in reality it ran to the United States. The factum of the promise advantaged both the con-

* Note the discussion of the parallel exercise of authority in *U. S. v. Curtiss-Wright*, 299 U. S. 304, 319-320.

signor and consignee; its performance would profit neither. Of a surety, the immediate parties foresaw the United States as alone enforcing the undertaking. From this it plainly follows, too, that Federal law governs in determining whether a non-party beneficiary may sue on the promise.[7] With its operation favoring the United States only, and with its performance possible there only, the promise was obviously intended by the parties to be enforced under Federal law, which accords the beneficiary a right of action.[8]

As to damages, the Court believes that the claim in the complaint will sustain a trial of that issue, should liability be proved.

Denial of the motion will be ordered.

(Sgd.) ALBERT V. BRYAN,
United States District Judge.

[1]

ALEXANDRIA, VIRGINIA, *September 7, 1951.*

United States District Court for the Eastern District of Virginia, Norfolk Division

Civil Action No. 1238

UNITED STATES OF AMERICA

v.

GUY W. CAPPS, INC., DEFENDANT.

Before United States District Judge, Hon. Albert V. Bryan, and a Jury

July 22, 1952

Appearances: Joseph Kovner, Esq., U. S. Department of Justice, and Charles R. Dalton, Esq., Assist-

[7] *Clearfield Trust Co. v. U. S.*, 318 U. S. 363, 366.

[8] *Pennsylvania Steel Co. v. N. Y. City Ry. Co.*, 2 Cir. 198 F. 721, 749; *In Re Wolf Mfg. Industries*, 7 Cir. 56 F. 2d 64, 67.

ant United States Attorney, for the United States. Ashburn, Agelasto & Sellers, by Williard R. Ashburn, Esq., for the Defendant.

* * * * *

[3]

SIDNEY S. JONES was called as a witness by counsel for the United States, and being first duly sworn was examined and testified as follows:

[4]

Mr. KOVNER. If the Court please, before I proceed with the examination of Mr. Jones, I would like to offer in evidence, marked for identification, as Government's Exhibit 1, a copy of an invoice dated January 4, 1949, from H. B. Willis, Incorporated, of Charlottetown, Prince Edward Island, Canada, to C. W. Capps, Incorporated, of Norfolk, Virginia, covering the sale of 48,544 100-pound bags of certified seed potatoes.

Mr. ASHBURN. Mr. Kovner, it is G. W. Capps.

The COURT. Is there any objection to it?

Mr. ASHBURN. None, Your Honor.

The COURT. Let it be admitted.

(Said invoice so identified was marked and received in evidence as "Government's Exhibit No. 1.")

Mr. ASHBURN. Mr. Kovner asked me for certain papers which I have tried to supply him. That was the subject of the conversation.

Mr. KOVNER. May I show it to the jury, or does the Court hold these papers?

The COURT. If you would like to show it to the jury——

Mr. KOVNER. I should like to offer in evidence, marked Government's Exhibit 2, a copy of the telegram sent by G. W. Capps, Incorporated, to H. B. Willis, and it is an office copy provided by the defendant.

[5]

No date is shown on this. I understand, Mr. Ashburn, that this was sent some time in December or the early part of January 1949.

Mr. ASHBURN. Your Honor, the telegram does not bear any date. Our thought is that it was sent in December since the ship was due to arrive in Jacksonville on January 5th, and I believe did arrive on January 9th. She must have left Prince Edward Island some time between the 27th of December and the last day of the month. We assume that the telegram was prior to her departure.

The COURT. You agree that the telegram was sent and received about that date?

Mr. ASHBURN. Yes, sir.

The COURT. Suppose you read the telegram.

Mr. KOVNER. Addressed to H. B. Willis, Incorporated, Charlottetown, Prince Edward Island, Canada.

"Certified seed potatoes loaded on S. S. *Gangway* are for planting in Florida and Georgia."

The COURT. Who signed it?

Mr. KOVNER. Guy W. Capps, Incorporated.

The COURT. Let it be admitted.

(Said telegram so identified was marked and received in evidence as "Government's Exhibit No. 2.")

Direct examination by Mr. KOVNER:

[6]

Q. Mr. Jones, will you tell us your address?

A. Sidney S. Jones from College Park, Georgia.

Q. And what is your present position, Mr. Jones?

A. I am special agent with the office of Compliance and Investigation, Production and Marketing Administration, United States Department of Agriculture, with headquarters at Atlanta, Georgia.

Q. How long have you had that position?

A. Since May 1942.

Q. Any interruption in that period of employment?

A. Yes, sir. I was in the Navy for three years, leaving in November of '42 and returning January '46.

Q. What were your qualifications for that position?

A. Well, I have been employed as an adjudicator for the Social Security Board before going with the Department. I am an attorney and member of the Bar in the District of Columbia.

Q. Will you just tell us briefly what are the functions of, duties of, a special agent of the Compliance and Investigation Division of the Production and Marketing Administration of the Department of Agriculture of the United States?

A. We can conduct investigations of violations, claims of any of the marketing agreements and orders, making laws and price support program for the Commodity Credit Corporation, anything involving claims and damages to the CCC. We make the investigation and have exclusive jurisdiction in these matters.

[7]

Q. In January 1949, were you directed to make an investigation into the disposition of potatoes loaded on the S. S. *Empire Gangway* in the Port of Jacksonville, Florida?

A. Yes, sir.

Q. Will you tell us what you did in the course of that investigation, what you observed, saw and heard?

A. I was in south Georgia at the time and was notified by telephone by my superior that this boat was being brought into Jacksonville, Florida, by Guy W. Capps, Incorporated, and that it was alleged by a produce dealer there——

Mr. ASHBURN. If Your Honor please, I object. I think the witness can tell what he did, but not what somebody else told him.

The COURT. Objection sustained.

Do not go into, Mr. Jones, what somebody told you. You were directed to make the investigation. Tell us what you did.

The WITNESS. I proceeded to the Municipal Docks at Jacksonville, Florida, on Sunday, January 9th and made inquiry of the guard there as to whether the *Empire Gangway* was in. The guard informed me it was out off the landing and hadn't arrived. Later he called me, told me the ship was in. I returned to the docks. They didn't begin unloading on Sunday. They began on Monday. On Monday I returned again

[8]

to the docks and observed the unloading. The *Empire Gangway* which was loaded at the time with potatoes marked Prince Edward Island and bearing tags Canadian No. 1 seed potatoes. I observed the loading of these potatoes into trucks, also observed the railroad cars spotted behind the warehouse there for this particular berth where the *Empire Gangway* was berthed. I noted the license tag numbers and car numbers of the railroad car spotted there to receive these potatoes.

On that same date, Mr. Vernon K. Gimson, special agent of our office arrived at the dock to assist me in this investigation and he also helped me taking the numbers. We noted that these potatoes were being inspected there at the dock and knowing that they had an inspection office, after I had compiled the numbers of the railroad cars, sufficient number, I then checked with the inspection office and got a complete record of every shipment that went off this boat, the inspection ticket number, the description of the truck and desig-

nation of the shipment which was furnished to the inspection service.

I also checked with the railroads as to the number of cars which were spotted along the siding there and there was 11 in the cars. I noted that the designation, some of these shipments were to Atlanta and I relayed by telephone the numbers of the cars that were going

[9]

to Atlanta and the destinations as reflected by the railroad in order that our Atlanta office could cover the destination of the potatoes that arrived in Atlanta.

I noticed that most of the inspections were for the Atlantic Commission Company in Jacksonville, and I observed that some of the railroad cars were marked to the Atlantic Commission Company of Jacksonville, so I went to their office.

Q. Just one moment. You found that—did you find out who this boat load had been sold to by Guy W. Capps, Incorperated?

A. Yes; I did.

Q. Who was it sold to?

A. Atlantic Commission Company.

Q. Will you hold that just one moment?

* * * * *

Mr. KOVNER. If the Court please, and ladies and gentlemen of the jury, I should like at this time to mark for identification as Government's Exhibit 3, I believe. This is a copy certified by the secretary-treasurer of Guy W. Capps to be a true copy of the invoice from Guy W. Capps, Incorporated, to the Atlantic Commission Company, of January 11, 1949, covering the sale to the Atlantic Commission Company

[10]

of potatoes from the S. S. *Empire Gangway*.

Mr. ASHBURN. May I see it, Mr. Kovner?

Mr. KOVNER. Yes, indeed, sir.

Mr. ASHBURN. No objection, Your Honor.

The COURT. Let it be admitted.

(Said invoice so identified was marked and received in evidence as "Government's Exhibit No. 3.")

By Mr. KOVNER:

Q. Mr. Jones, would you continue with your account of your investigation?

A. Up to that point, I had compiled a complete list of the trucks and rail shipments coming from the *Empire Gangway* loaded with Canadian potatoes.

I next proceeded to determine at the ultimate destinations as to what use would be made of these potatoes.

The first place that I went to was the Atlantic Commission Company office in Jacksonville and interviewed J. A. Zeigler, vice president of the Atlantic Commission Company, to determine what they would do with the Canadian seed potatoes which they had purchased from Mr. Capps.

Q. Did you tell Mr. Zeigler who you were?

A. I identified myself to Mr. Zeigler as being a special agent of the Department of Agriculture, conducting an official investigation of the matter.

* * * * *

[11]

Q. Did you observe the destination of any of these potatoes?

A. I did.

Q. Will you describe to us what you saw as to the ultimate destination of the potatoes from the shipment, as many as you could observe?

Mr. ASHBURN. I don't know whether this is objectionable or not. I suppose it enters into the plaintiff's theory of establishing its damages. It would seem to

[12]

me from what I have seen and heard that Mr. Kovner is now about to attempt to show that a certain quantity were eaten and not planted. If I may cut across the refinements of the matter, I expect that would be admissible, according to his theory of the proof of damages, but I wish to call it to the Court's attention, to the fact that it is not admissible on any other issue as we see it.

The COURT. The question is, What was his observation of the disposition of potatoes?

Mr. ASHBURN. Ultimate disposition.

The COURT. What he saw.

Mr. KOVNER. That is right, Your Honor.

The COURT. I think it is admissible at this stage.

By Mr. KOVNER:

Q. Would you proceed?

A. I noted that two 100-pound bags of these potatoes had been sold to Weinstein Brothers at St. Augustine, Florida.

I proceeded to the business of Weinstein Brothers, at St. Augustine, Florida, and was permitted by Abraham Weinstein, partner of the business, to observe the potatoes in his place, to examine his records and to actually see what he was doing with the potatoes.

Q. What did you find out?

A. I found that the potatoes were being dumped out of the 100-pound sacks into the vegetable bin up

[13]

in front, where they were being sold to customers, and I observed ladies duly purchasing the potatoes while I was in the store.

Q. What sort of ladies were they?

A. Two white ladies, customers of the store, buy-

ing other groceries, and also purchased potatoes while I was in the store.

Q. Did they appear to be housewives?

A. Yes, housewives.

Q. Did you see any other, did you trace any other shipment of these potatoes?

A. Not myself, but——

Q. Well, if you didn't, just what you personally saw.

A. Arrangements were made to do that.

Mr. KOVNER. Very well.

That is all.

Cross-examination by Mr. ASHBURN:

Q. Mr. Jones, concerning the two purchases which these ladies in the store made, Weinstein Brothers at St. Augustine, Florida, what was the quantity of the purchase?

A. Five pounds.

Q. Each?

A. Yes, sir.

Q. So you saw ten pounds of the potatoes disposed of?

A. That is right, sir.

[14]

Q. Did you talk with the ladies?

A. No, sir. I did not interview the ladies.

Q. Did you ask them whether they were going to plant them in a home garden, or eat them?

A. I did not.

Q. Do you know what they did do with them?

A. No, sir. I did not.

Redirect examination by Mr. KOVNER:

Q. Mr. Jones, were there any signs on these potatoes on the retail bins?

A. U. S. No. 1 potatoes.

The COURT. How did they get to Weinstein's?

The WITNESS. Oh, on Mr. Weinstein's truck, from the boat. He hauled two 100-pound bags to his place of business.

The COURT. Do you know who sold them to Weinstein?

The WITNESS. Yes, sir. Atlantic Commission Company.

The COURT. Atlantic Commission Company.

(The witness stepped down.)

Thereupon VERNON K. GIMSON was called as a witness by counsel for the United States and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

* * * * *

By Mr. KOVNER:

(15)

Q. Mr. Gimson, will you tell the jury your name and address?

A. Vernon K. Gimson. I live in Jacksonville, Florida.

Q. What is your present position, Mr. Gimson?

A. Special agent and accountant for the U. S. Department of Agriculture, Office of Compliance and Investigation, office in Atlanta, Georgia.

Q. How long have you held that position?

A. Since March 15th, 1947.

Q. Prior to that time what was your position, Mr. Gimson, the preceding period?

A. I was about eight years with the Supervisor of the Wage and Hour Office for the United States Department of Labor, in charge of the State of Florida, and later in charge of the State of Georgia, in the same capacity.

Q. What are your duties as a special officer of the

[16]

Compliance and Investigation Office of the Production and Marketing Administration of the Department of Agriculture?

A. My duties are to conduct investigations in connection with the Commodity Credit Corporation on price support programs, and ACP programs, anything connected with the PMA programs on farm products.

Q. In January 1949, did you make an investigation into the disposition of a shipment of potatoes on the S. S. *Empire Gangway* at Jacksonville, Florida?

A. Yes, sir. I was instructed by my office in Atlanta to contact Special Agent Jones in Jacksonville, on Monday, I think it was January 10th, and to assist Mr. Jones in conducting an investigation of the unloading of Canadian seed potatoes from the S. S. *Empire Gangway*.

I assisted Mr. Jones in observing the loadings of the trucks and cars, railroad cars, and also assisted Special Agent Jones in making his other railroad contacts in the investigation.

Q. Did you observe the sale of these, disposition of these potatoes, follow through the disposition of some lot of these potatoes?

A. Yes. I followed one truckload that was marked with the name of Winn & Lovett Company, on the truck.

Q. Winn & Lovett?

A. Winn & Lovett.

[17]

Q. Do you know what that firm was?

A. Yes. I am very well acquainted with it. They operate in Florida, through central Florida.

Q. What do they operate?

A. They operate a series of retail stores. I understand there are 69 retail stores throughout central Florida and they have a warehouse on State Street, in Jacksonville, and this truck went to the yard of this warehouse.

Q. Did you find out this was a truckload of potatoes they had purchased from the Atlantic Commission Company?

A. It was the same truck that we had witnessed the potatoes being loaded on which we followed on to this warehouse.

Later I interviewed a Mr. Adams and a Mr. Ruediger.

Q. Who are they?

A. Mr. Joe A. Adams was the produce manager and F. C. Ruediger was the produce buyer for Winn & Lovett Grocery Company. I interviewed them at the office of the warehouse on January 18th, 1949, and they advised me that they——

Mr. ASHBURN. Objection, if Your Honor please

The COURT. Objection sustained.

Don't go into that, Mr. Gimson, what they told you.

By Mr. KOYNER:

Q. Just tell what you saw as to the handling of potatoes.

A. Before I went in to interview Mr. Adams and

[18]

Mr. Ruediger, I noticed from outside of the fence which surrounds the lot at the warehouse that this same truck was backed up to the receiving department and the potatoes had been loaded into the truck, were being unloaded.

Q. Did you find out that these potatoes went to the——.

Mr. ASHBURN. Objection to it. He is asking a leading question.

By Mr. KOVNER:

Q. Did you find out what Winn & Lovett did with these potatoes?

Mr. ASHBURN. That requires some qualification, I think, of his own knowledge.

The COURT. Did he see what?

Mr. ASHBURN. That is good.

The WITNESS. I went to one of the Winn & Lovett retail stores and——

By Mr. KOVNER:

Q. Where was that store located?

A. South Jacksonville.

Q. In what part of the town of Jacksonville?

A. Atlantic Boulevard.

Q. Would that be a downtown section of Jacksonville?

A. No. That's across the St. Johns River, into a separate locality.

Q. Residential area of Jacksonville, Florida?

[19]

Mr. ASHBURN. If Your Honor please, all these questions are leading, but what difference would it make whether it was a residential or business?

The COURT. What kind of area was it?

The WITNESS. It was a residential area, Your Honor. And I noticed a number of bags of potatoes that were put up in 10-pound paper sacks and these sacks were unmarked with respect to whether the potatoes were seed potatoes or otherwise.

I observed these potatoes and noticed that the skins on these potatoes were of very reddish color, or which was the same color of the potatoes we had observed

coming from the S. S. *Empire Gangway*. Mr. Adams advised that they had put up——

Mr. ASHBURN. If Your Honor please, we object.

The COURT. Don't go into that.

* * * * *

[20]

The WITNESS. I will say this, that I observed people purchasing these bags of potatoes.

By Mr. KOVNER:

Q. Would you describe what sort of persons the purchasers were?

A. They were apparently housewives.

Mr. ASHBURN. If Your Honor please, that is speculative.

Mr. KOVNER. As a matter of common knowledge, you can tell from people going into——

The COURT. Describe them to us.

The WITNESS. They were just ordinary women bent on buying groceries and products and various things

[21]

that are usually found in a retail store, and they would take a bag of these potatoes, put it in the little wheel carts they put their produce in and took it up to the cashier. When they went out, that's as far as I know what happened to the potatoes.

Mr. KOVNER. That is all.

Cross-examination by Mr. ASHBURN:

Q. Mr. Gimson, as a matter of fact, you haven't the slightest idea whether the potatoes you saw in the Wine & Lovett's store at Atlantic Boulevard, in South Jacksonville were a part of the cargo of the S. S. *Empire Gangway* or not?

A. I know from——

Q. You say they were the same color. That is all you can say about them?

A. I didn't observe that they came from the bags that these potatoes originally came in, from observation.

Q. You did not observe that?

A. Not from observation; no, sir.

Q. Do you know anything about the quantity of Canadian table stock potatoes that were imported into the United States legally, in the fall of 1948?

Mr. KOVNER. I object to that. This witness has not been qualified.

The COURT. He was asked if he knew anything about it.

[22]

The WITNESS. I have no idea, sir.

By Mr. ASHBURN:

Q. You have no knowledge as an employee of the Department of Agriculture?

A. No; I have not, sir.

Q. You do know that there were a considerable quantity of importation without knowing the quantity?

A. I know there were considerable quantities imported into the Jacksonville area which, from my contact with the PMA office in Gainsville, I know that very few of these potatoes were planted for seed.

Q. I was speaking of the table stock imported up to December 1, 1948, classified as table stock. There were over two million bushels, weren't there?

A. I wouldn't know that, sir, the quantity.

Q. All right. One thing more. The particular truck—you spoke of a truckload of potatoes going to Winn & Lovett Company, would you say what would be the quantity on the truck?

A. Well, I should imagine it would be around 400 bags, 100-pound weight.

Q. Did you count them?

A. No, sir; I did not count it, but it was a large semitrailer truck that has the capacity, I believe, about the same as a freight car which holds 400 100-pound bags.

Mr. ASHBURN. That is all.

[23]

(The witness stepped down.)

Thereupon, DAVID B. WARD was called as a witness by counsel for the United States and, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. KOVNER:

Q. Mr. Ward, would you tell the ladies and gentlemen of the jury your name, address, and present position?

A. My name is David B. Ward. I live in Atlanta, Georgia. My present position, I am an auditor with the Office of Audit, Production, and Marketing Administration.

Q. What was your position in January 1949?

A. At that time I was a special agent accountant with the Office of Compliance and Investigation of the Production and Marketing Administration, United States Department of Agriculture.

Q. In January 1949, were you directed, as part of your duties, to investigate a certain carload of potatoes?

A. I was.

Q. What was the nature of your direction?

A. Well, I was instructed to trace the carload of potatoes that was leaving Jacksonville and due to arrive at Atlanta, Georgia. Trace the ultimate location of that car.

[24]

Q. Did you know the agent who reported the information concerning this carload?

A. I know the agent.

Q. Who was the agent that reported it?

A. Sidney Jones.

Q. Did you locate that carload?

A. I did.

Q. Will you tell us what you observed as to this carload, where it was?

A. It was situated on a track near the warehouse of the A & P Company.

Q. Did you understand that this was a carload?

Mr. ASHBURN. If Your Honor please, I think he can give the car number, state what he observed about it, but I do not think——

The COURT. Did you see where the business came from that were put in the car?

Mr. KOVNER. Your Honor, I beg your pardon.

The WITNESS. I did not see where they came from.

The COURT. You started with the car?

The WITNESS. I started with the car number; yes, sir.

The COURT. Give us the car number.

The WITNESS. That would be FGEX21798.

By Mr. KOVNER:

[25]

Q. Was that one? Would you proceed, then, with the way you saw what happened to that carload of potatoes?

A. Well, when I got the instructions, I called the clerk of the Georgia Railroad Company and he informed me that that car was on a train due to arrive approximately 1:15 p. m., that afternoon. Later that afternoon or that evening, I located that car as I mentioned before on a track near the A & P

Tea Company warehouse on Memorial Drive, in Atlanta. That was late at night and the car was locked and sealed.

The following day, in the company of the special agent in charge, Mr. Dabney, we visited the offices of the A & P Tea Company and also the Atlantic Commission Company, which were in the same building there.

Q. Did you see the sacks of potatoes being unloaded from this car into the warehouse?

A. The best of my recollection as to unloading of those sacks, they were being unloaded from that car on to a truck and trucked over to the A & P Warehouse.

Q. Did you find out where those potatoes were going?

A. We——

Mr. ASHBURN. Did he observe where they went?

By Mr. KOVNER:

Q. Did you observe where they went?

A. We contacted H. M. Lowery, produce foreman at the warehouse, and he exhibited——

[26]

Mr. ASHBURN. I object, if Your Honor please, to statements made by a produce foreman at the A & P Tea Company warehouse.

The COURT. I think that is right. He can't bring in what he said. Let him go ahead and see what his observation was of what he saw himself in regard to the disposition.

The WITNESS. He exhibited distribution sheets regarding this carload.

The COURT. Don't go into that.

What next did you see happen to the potatoes?

The WITNESS. I didn't see anything else happen to those particular potatoes.

By Mr. KOVNER:

Q. Did you observe any potatoes in any retail outlet of the A & P in the course of this investigation?

A. I did. That is where this distribution sheet comes.

The COURT. Let him go ahead without referring to the distribution sheet.

By Mr. KOVNER:

Q. Will you tell us what you saw of Canadian potatoes in the course of A & P distribution arrangements as you made this investigation?

A. Well, we contacted a market in Atlanta called the Edgewood Market on Edgewood Avenue, and that is one of the A & P markets.

[27]

Q. Is that located in the residential section of Atlanta?

A. Thickly populated section of Atlanta.

Q. Did you see any sacks of Canadian seed potatoes at that store?

A. We saw, I think it was, three full sacks in the store and two or three empty sacks, not empty, but partly empty, of these Canadian seed potatoes.

Q. Did you see the same type of potatoes in the retail bin in the store?

A. We saw the potatoes in the bin and we saw——

Q. Did you see anyone buying these potatoes?

A. Saw customers buying them.

Q. What sort of persons? Will you describe them?

A. Apparently housewives out doing their regular shopping.

Mr. KOVNER. That is all.

Cross-examination by Mr. ASHBURN:

Q. You speak of a carload of potatoes. Would that be about 400 bags?

A. I haven't any idea particularly how many bags they would put in a carload.

Q. One of the witnesses I think said in estimating the quantity on a truck that he assumed it was 400

[28]

bags because that was the capacity of a railroad carload, I think. Do you have any knowledge about that?

A. No, sir. I don't. I know they vary somewhat according to the size of the car and its condition.

Q. You mention car FGEX21798, that would be a Fruit Growers Express Company refrigerated car, wouldn't it?

A. It would appear to be from the initials on it.

Q. Did it appear to be a refrigerated car such as would normally be used to transport seed potatoes?

A. That I wouldn't know, sir.

Q. You mentioned going in an A & P Tea Company store in Atlanta and seeing in that store three full sacks and two or three partly empty sacks of Canadian seed potatoes.

A. Yes.

Q. Were the sacks marked Canadian seed potatoes?

A. They had tags on them.

Q. Showing that they were Canadian seed potatoes?

A. Yes, sir.

Q. So that everybody who wished to buy would know that they were buying Canadian seed potatoes?

A. Those were in the sacks and on the tags—rather, were on the sacks in the bag. The potatoes that they were buying were in the bin in the store.

Q. You did not know whether the potatoes in the bins came out of the sacks or not, did you?

[29]

A. Only by the appearance.

Q. Well, one potato looks much like unto another, doesn't?

A. I didn't see any other potatoes there that looked any different from those in the sacks, that, in those.

Q. Let's tear that down a minute. Mr. Ward, from your experience, don't you know as a fact that you can take a Canadian table stock potato and Canadian seed potato and lay them side by side on that table and a human can't distinguish any difference between one and the other; isn't that a fact?

A. I wouldn't know, sir.

Q. You don't know that?

Mr. ASHBURN. Stand down.

Mr. KOVNER. May I have just a word on redirect?

Redirect examination by Mr. KOVNER:

Q. Mr. Ward, did these potatoes have any particular hue or color?

Mr. ASHBURN. Which are you talking about?

By Mr. KOVNER:

Q. The potatoes that you saw in the sacks.

A. Sort of a reddish skin like.

[30]

Q. Reddish hue?

A. Yes.

Q. Did the potatoes in the retail bin have the same reddish hue?

A. Yes.

Q. Was there any sign on the retail bins?

A. Not that I recall, except the price.

Re-cross-examination by Mr. ASHBURN:

Q. Do you know anything much about potatoes?

A. Not particularly; no, sir. Except where we are concern with an investigation of this type.

Q. Well, from your knowledge and experience, do you know that the color of the potato comes from the soil in which it is grown?

A. Not from my knowledge and experience; no, sir.

Q. Do you know that all Prince Edward Island potatoes have a red tinge?

A. I don't know it, but I have heard it. I have been told. I don't know.

Mr. ASHBURN. All right. Stand down.

(The witness stepped down.)

Mr. KOVNER. If the Court please, I should like to recall briefly Agent Jones.

Thereupon, SIDNEY S. JONES was recalled as a witness by counsel for the United States and, having been previously duly sworn, was examined and testified as follows:

Direct examination by Mr. KOVNER:

[31]

Q. Mr. Jones, you have already testified concerning your observation of the unloading of the potatoes from the S. S. *Empire Gangway* on January, or about January 11, 1949. Did you take down the numbers of the railroad cars into which some of these potatoes were unloaded?

A. Yes, sir. I took them all down.

Q. Can you tell us whether the number of one of these railroad cars was FGEX21798?

Mr. ASHBURN. 1798?

Mr. KOVNER. 21798.

The COURT. It was FGEX. I thought you said PGEX.

Mr. KOVNER. May the witness have the report to refresh his recollection? I think that will show it better than anything else.

By Mr. KOVNER:

Q. Go ahead.

A. What was the number?

Q. I understood it to be PGEX21798 but your record——

A. FGEX21798 is the car number.

Q. Did you transmit that car number to Atlanta, your office in Atlanta?

A. I did, by telephone.

[32]

Mr. ASHBURN. No questions.

(The witness stepped down.)

Mr. KOVNER. If the Court please, I have here the copy of a deposition that was taken in this case of a witness. The original is on file, on record in this case, as required by the Federal Rules of Procedure. It is the deposition of Mr. J. A. Zeigler, who was the vice president and original manager of the Atlantic Commission Company at Jacksonville, Florida, in January 1949. I should like to offer this deposition in evidence and to read certain portions of it which I think would be helpful to the Court and to the jury.

The COURT. I imagine opposing counsel will want it all read if any of it is read.

Mr. ASHBURN. I am sorry, sir. I could not hear you.

The COURT. I say I imagine you will want all of it read if any of it is read.

Mr. ASHBURN. Yes, sir. Of course there is no objection to the reading of it except that certain objections were made and stated when the deposition was taken in Jacksonville, and we think some of those objections are good. They relate mainly to hearsay matters.

The COURT. All right. Suppose you put Mr. Dalton on and let him read the answer and you read the questions to him. When you strike an objection pause, so I can pass on it.

[33]

The reporter will just take the objections.

Mr. ASHBURN. If Your Honor please, a word of explanation to the Court may be in order so that the Court will understand the point of the objection, when it comes to that point in reading the deposition.

The effort of the Government, by taking Mr. Ziegler's deposition, was to show that the purpose of the Atlantic Commission Company in buying this shipload of potatoes was to use them for table stock, or as food. That was its effort, its objective, and the further purpose of the Government was an attempt to show what quantity of them, so far as the witness knew, had actually been so used, and what quantity had been used for planting or seed.

I offer that only in explanation of the objections as they are reached in the deposition. Your Honor will see the point of the objection better.

Mr. KOYNER. May I say at this point, Your Honor, that the deposition was not concerned principally, only as it might appear incidentally, as to what was the actual disposition made by the Atlantic subsidiary company that purchased the whole boatload.

Mr. ASHBURN Not from the A & P; the Guy W. Capps.

Mr. KOYNER. No. It is to show what, at the time the transaction took place, what the business of A & P was and what the likely use of the potatoes would

[34]

be. We do not think the Government has to show what actually happened to every potato, if it shows what were the channels of the potatoes, what dis-

position the potatoes were when they went out of the possession of Guy W. Capps, Incorporated, on a bill of sale to the Atlantic Commission Company.

The COURT. All right, sir.

Mr. KOVNER. I will read the opening part of this deposition.

The COURT. I do not think you need to. Just start with the questioning and the answers.

Mr. KOVNER. Very well. May I show that the deposition says it was taken, Miss Edit House, Assistant United States Attorney of Jacksonville, and Mr. W. R. Ashburn, appearing for the defendant.

(Thereupon the deposition of J. A. ZEIGLER was read to the jury, pursuant to the directions of the Court; Mr. Kovner reading the questions and Mr. Dalton the answers.

* * * * *

[Dep. p. 2]

J. A. ZEIGLER having been first duly sworn as a witness, testified as follows:

Direct examination by Miss HOUSE:

Q. Please state your name.

A. J. A. Zeigler.

Q. What position do you hold with the Atlantic Commission Company?

A. Vice President of the Southern Division.

Q. Did you hold the same position during the years 1948 and 1949?

A. Yes.

Q. Were you here in Jacksonville at that time?

A. Yes.

Q. I mean, that is your headquarters?

A. Yes.

Q. Is the Atlantic Commission Company an affiliate of the Great Atlantic and Pacific Tea Company?

A. Yes.

Q. From your knowledge gained from working with the Atlantic Commission Company, what is the principal business of the Great Atlantic and Pacific Tea Company?

A. What is the principal business of the Great Atlantic and Pacific Tea Company?

[Dep. p. 3]

Q. Yes. What is it organized for, the Great Atlantic and Pacific Tea Company?

A. The Great Atlantic and Pacific Tea Company is a retail grocery organization.

Q. For the retail sale of food?

A. That's right.

Q. What is the principal business of the Atlantic Commission Company?

A. A fruit and vegetable buying subsidiary for the Great Atlantic and Pacific Tea Company.

Q. Do you buy for the purpose of selling exclusively to the Atlantic and Pacific Tea Company?

A. Yes.

Q. Was that true in 1948 and 1949?

A. It was true until April 1st. Wait a minute. As of April 1, 1949, the Atlantic Commission Company discontinued its sales to the outside trade.

Q. Prior to that time, though, it was an affiliate of the Great Atlantic and Pacific Tea Company all during 1948 and 1949?

A. Right.

Q. Even though you were selling to what you call the trade?

A. Right.

Q. You mean by the trade, wholesalers?

[Dep. p. 4]

A. That's right.

Q. Food wholesalers?

A. That's right.

Q. Do you know, or did you know Guy W. Capps?

A. Yes, ma'am.

Q. Did you know him personally?

A. I knew him personally.

Q. You knew him where he was in business at that time?

A. I did.

Q. What kind of business was he in?

A. He was in the fruit and vegetable distributing business; and in that, I think he did some importing of some commodities, but mainly it was in the area of the United States.

Q. Well, since you had business dealings with him, was he familiar with the type of business you were in?

A. Yes.

Q. And the company that you represented?

A. Yes.

Q. Was he familiar with the fact that the Atlantic Commission Company was, in 1948 and 1949, a subsidiary of the Great Atlantic and Pacific Tea Company?

A. Yes, ma'am.

Q. Now, during the years 1948 and 1949, I believe you said you were personally in charge of the

[Dep. p. 5]

Southern Regional Office of the Atlantic Commission Company here in Jacksonville?

A. Yes.

Q. What territory does the Southern Regional Office serve?

A. Well, the Southern Division is comprised of the area from Florida to the Carolinas, including North Carolina, Eastern Tennessee, Georgia, Alabama, Louisiana, and about half of Texas.

Q. Now, do you personally remember, in 1948——?

A. Mississippi should be in there, too, by the way.

Q. Do you remember, in December 1948, contacting Mr. Guy W. Capps, who was president of Guy W. Capps, Inc., Norfolk, Virginia, with the idea of purchasing for your company, the Atlantic Commission Company, a cargo of potatoes, Irish potatoes?

A. We purchased a number of cargoes of potatoes, and I can't recall any specific one.

Q. Well, specifically, I am referring to a cargo of Irish potatoes that was due to arrive in Jacksonville on or about January 11, 1949, on the S. S. *Empire Gangway?*

A. I don't remember that specifically; but I know enough about the pattern of the transactions to recall that I purchased it.

Q. Do you know whether or not your company,

[Dep. p. 6]

your office here of the Atlantic Commission Company, did purchase a cargo of potatoes that arrived in Jacksonville on January 11, 1949?

A. Yes.

Q. On the S. S. *Empire Gangway?*

A. Yes.

Q. And that purchase was made from whom?

A. Guy W. Capps, Inc.

Q. Now, you may use your records, if you want to, to refresh your memory.

A. I am going to.

Q. What was the volume of that cargo that you purchased?

A. 48,544 bags.

Q. What was the weight of each bag?

A. Approximately one hundred pounds.

Q. What kind of potatoes were they?

A. Those were Canadian seed potatoes.

Q. Did they have any number to call them by, any grade or number on the records?

A. Well, they were Canadian No. 1.

Q. Is that the best grade?

A. That is the best grade. In fact, Canadian seed potatoes are the best grade that you can buy.

Q. You mean from Canada or anywhere?

A. Canada or elsewhere, to my knowledge.

[Dep. p. 7]

Mr. ASHBURN. I think, if you will have him refer to the record, he will find that the correct official designation was Canadian Certified seed potatoes.

Q. Do you have the original invoice, Mr. Zeigler, of Guy W. Capps, Inc.?

A. Yes; I do [referring to document]. Canada No. 1 Seed Potatoes is on the invoice. That is the way the invoice reads that we received.

Q. Is that the original invoice that was presented to the Atlantic Commission Company for payment?

A. Yes.

Q. And how much per sack is that billed to you?

A. $3.35.

Q. What does the total cost come to for the whole 48,544 sacks?

A. $162,622.40.

Q. That is the amount, then, that was paid to Guy W. Capps, Inc., for those potatoes?

A. I am a little confused by the manner in which the Guy W. Capps Invoice was made up, the original I refer to and which we received from Capps, because, after we bought the 48,544 sacks of Canada No. 1

seed potatoes at $3.35, we sold Guy W. Capps, Inc., 10,000 bags of that portion at $3.65. Our invoice on

[Dep. p. 8]

that showed that they were sold, at least the invoice is dated, January 11, 1949.

Q. That is the date of the invoice of Atlantic Commission Company to Guy W. Capps?

A. That's right; dated, January 11, 1949.

Q. What is the date of the invoice to you from Capps?

A. The date of the invoice to us from Capps is January 11, 1949.

Q. That is the original invoice you received from Guy W. Capps, Inc.?

A. That's right.

Miss HOUSE. The Government tenders in evidence this original invoice and asks that it be marked as "Plaintiff's Exhibit A" to this deposition.

Mr. ASHBURN. No objection.

* * * Said original invoice was received and marked "Plaintiff's Exhibit A."

Q. Now, I believe you testified that, after purchasing this entire cargo of potatoes from Guy W. Capps, Inc., you immediately resold to them ten thousand sacks at $3.65 per sack, f. o. b. Jacksonville; or, was that f. o. b. Jacksonville?

A. That was $3.65 delivered on wharf at Jacksonville. But I do not recall whether or not it was immediately; but knowing the manner of dealing on these various types of purchases, I am quite confident

[Dep. p. 9]

it was not immediately after we purchased them because after we purchased the original 48,544, the transaction would not have been simultaneously where we sold the ten thousand back to him at thirty cents

profit. It doesn't all fit. I can't recall how it worked; but it just doesn't fit in, that it was immediately.

Q. Do you know whether or not all of these 48,544 sacks were delivered to your company, or your warehouse, before the ten thousand were sold back to Capps? If you know, or do you have any records that would indicate that you actually took delivery of the whole lot, and then sold the ten thousand; or the ten thousand sacks were sold to him there on the wharf or in the ship?

A. I do not recall.

Q. You don't think you have any records that would help answer that?

A. No, I have no record here; I have nothing in our files that I can refer to now that would answer your question.

Q. Well, taking into consideration the resale of ten thousand sacks to Mr. Capps, or his company, the result was that you received how many sacks, that the Atlantic Commission Company actually received for its business, how many sacks of these potatoes?

A. Approximately 38,544 sacks.

[Dep. p. 10]

Q. And the cost to your company for those bags actually received was how much?

A. $3.35 f. o. b. the wharf at Jacksonville.

Q. And that comes to what total amount?

A. $126,122.40.

Q. Now, do you have records indicating the disposal of those 38,544 sacks of potatoes by the Atlantic Commission Company?

A. Yes, ma'am.

Q. Were most, or substantially all, of them sold to the Great Atlantic and Pacific Tea Company?

A. No, ma'am.

Q. Do you have your records there indicating how many were sold to the Great Atlantic and Pacific Tea Company?

A. Yes, ma'am.

Q. Are they all in one invoice there?

A. No, ma'am.

Q. Do you have copies of your invoices showing the amount sold to the Atlantic and Pacific Tea Company?

A. Yes, ma'am.

Q. Are they your office copies?

A. Yes, ma'am.

Q. What happened to the originals?

A. The originals were sent to the Great A & P Tea Company.

[Dep. p. 11]

Q. Have you made a recap for the purpose of giving this testimony, and knowing in advance somewhat what the Government expected to prove by you, have you made a recap of the amount of these potatoes sold to the Great Atlantic and Pacific Tea Company, taking your information from your office copies of the invoices?

A. Yes, sir.

Q. And what was the total amount?

Mr. ASHBURN. May I look at the recap before I determine whether I want to interpose any objection to it?

Miss HOUSE. Yes.

Mr. ASHBURN (examining document). That will be sufficient for my purposes.

Q. What was the total number of sacks sold?

A. Sold to whom?

Q. The Atlantic and Pacific Tea Company.

A. 13,627.

Q. Now, you have your office copies of your invoices to substantiate that total figure; is that true?

A. Yes, ma'am.

Miss HOUSE. The Government tenders in evidence as Plaintiff's Exhibit B, those office copies, as one exhibit.

Mr. ASHBURN. No objection.

[Dep. p. 12]

* * * Said office copies being received and marked "Plaintiff's Exhibit B."

Q. What happened to the rest of the potatoes? I mean how did the Atlantic Commission Company dispose of the remainder?

A. They were sold to fruit and vegetable wholesalers in the Southeastern area.

Q. These wholesalers, were they affiliated with the Great Atlantic and Pacific Tea Company?

A. No, ma'am.

Q. You have your invoices there showing the dis postion of the remainder of these potatoes?

A. Yes, ma'am.

Q. Now, Mr. Zeigler, have you made a recapitulation of these invoices, showing the dates of the sales, the purchaser thereof, and the amount?

A. Yes, ma'am.

Q. Does the recap also show the location of the various purchasers' places of business?

A. Yes, ma'am.

STIPULATION

It is stipuated between counsel for the respective parties hereto that, in lieu of introducing in evidence as an exhibit for the plaintiff the office copies of Atlantic Commission Company showing the sale of the remainder of the cargo of potatoes, that there

[Dep. p. 13]

shall be introduced and filed in evidence as Plaintiff's Exhibit B, the said recapitulation made by Mr. Zeigler from his office copies of invoices.

It is further stipulated that, since the said recap of the sales of these potatoes by the Atlantic Commission Company to other wholesalers includes records of the sales to the Great Atlantic and Pacific Tea Company, that Exhibit B heretofore introduced in evidence may be withdrawn and returned to the Atlantic Commission Company.

It is further stipulated that a photostat copy of Plaintiff's Exhibit A heretofore introduced in evidence shall be substituted for the original, and the original returned to the Atlantic Commission Company.

* * * Said original Plaintiff's Exhibit A being withdrawn, photostatic copy thereof is received, filed in evidence, marked "Plaintiff's Exhibit A," and said photostatic copy being hereunto attached.

* * * Said original office copies of the Atlantic Commission Company having been withdrawn, said recapitulation of invoices is received in evidence, marked "Plaintiff's Exhibit B," and said recap being hereunto attached.

Q. Now, Mr. Zeigler, these potatoes that were bought from Mr. Capps off the S. S. *Empire Gangaway*. They were bought by your company for what purpose?

A. Resale.

[Dep. p. 14]

Q. For resale and what?

A. As what? You mean as to the type of potatoes?

Q. Yes. Well, were they to be used for food?

A. I don't know. I can't tell you the disposition beyond the Atlantic Commission Company.

Q. Normally, what is the purpose of your buying commodities for resale to the Great A & P Tea Company?

Mr. ASHBURN. I object to the question as being irrelevant and immaterial; as calling for an opinion from the witness. The general purchases of the Atlantic Commission Company, we contend, having no bearing on the issues presented in this case.

(The question was read.)

Q. And to put the question this way: You have testified, I believe, that the Great Atlantic and Pacific Tea Company is a retail seller of food. Do you buy commodities for that company to fulfill that purpose?

A. Yes.

Q. How many other commodities do you buy, approximately?

A. Other than food?

Q. Other than potatoes; how many other food articles?

A. Oh, I would say approximately eighty.

Q. Do you buy anything other than food for resale?

[Dep. p. 15]

A. Oh, yes.

Q. What is the nature of those?

A. We buy seed potatoes, we buy onion sets. That is about all I can think of offhand.

Q. At the time you bought this particular lot of potatoes, did you know for what purpose they were to be retailed by the A & P and these other wholesalers?

A. No, ma'am.

Q. Isn't it true that you bought all of your commodities, including potatoes, primarily for food purposes?

A. Define primarily, will you?

Q. Well, substantially, Mr. Zeigler, is the Great Atlantic and Pacific Tea Company in the business of supplying plants and seeds? I mean, does a substantial part of their business go to that?

A. No; that is a secondary part.

Q. That is a secondary part?

A. Right.

Q. Now, these Canadian No. 1 seed potatoes that were purchased from Capps, they are edible, aren't they?

A. Yes, ma'am.

Q. Did I understand you to testify heretofore that they are as good as any edible potatoes produced in this country?

[Dep. p. 16]

A. Yes, ma'am.

Q. Well, are they considered good table stock potatoes comparable to good Irish white table stock potatoes produced in this country?

Mr. ASHBURN. You mean in quality?

Miss HOUSE. Yes.

A. Yes, ma'am.

Q. Were Canadian seed potatoes, back at the time these were purchased, say roughly in the latter part of 1948 and early part of 1949, sold at retail for table stock at about the same price as comparable Irish potatoes produced in this country? You answered for retail. How about the wholesale price? Were Canadian potatoes bringing as much on the market as the locally produced potatoes of comparable stock?

A. Generally speaking, to the best of my memory, Canadian potatoes were lower priced than the United States potatoes.

Q. That is the wholesale price you are speaking of?

A. That is the wholesale price.

Q. Could you give us an approximate idea of the difference in the price, say by the hundred pounds?

A. From twenty-five to fifty cents per hundred pounds.

Q. In other words, you could get Canadian potatoes, seed potatoes, at about anywhere from twenty-five to

[Dep. p. 17]

fifty cents a hundred pounds cheaper than you could buy American grown potatoes?

A. To the best of my memory, yes.

* * * * *

[Dep. p. 22]

Cross-examination by Mr. ASHBURN:

Q. In 1948, who was president of the Atlantic Commission Company?

A. Who was the president of the Atlantic Commission Company?

Q. Yes, sir.

A. If my memory serves me correctly, it was Mr. D. T. Bofinger.

Q. Who was your immediate superior in the company?

A. In the Atlantic Commission Company?

Q. Yes.

A. Mr. H. A. Baum.

Q. Mr. Harvey A. Baum?

A. Right.

Q. He was a vice president in 1948?

A. I believe he was.

Q. Who was the administrative head, who directed the quantity of purchases to be made by the Atlantic Commission Company? What was Mr. Baum's contact with the Southern Division of the Atlantic Commission Company?

A. He is my immediate superior.

Q. And was at all times during 1948 and in 1949?

A. Right.

Q. I believe you have stated that you are the in-

[Dep. p. 23]

dividual who conducted the dealings with Guy W. Capps, Inc., concerning the purchase of the cargo of seed potatoes on the S.-S. *Empire Gangway*. How did that dealing originate, concerning that cargo; did you offer to Guy W. Capps, Inc., to sell, or did he request from you to buy?

A. Practically all purchases of that type originated—I don't know how to phrase this. But in other words, Guy W. Capps was the moving force as a general rule behind all of these sales, because he was always anxious to sell something. I think you are aware of that.

Q. Do you have any ind pendent recollection of this particular cargo?

A. I am sorry, but I don't.

Q. Do you know actually when you bought the cargo?

A. As to the exact date, no.

Q. It was some time in December, was it not, 1948?

A. I couldn't say for sure on that.

Q. You purchased the cargo as Canadian No. 1 seed potatoes?

A. To the best of my knowledge, yes.

Q. And ordered the cargo as such, did you not?

A. Well, the way you phrase that question, I don't want to say that I ordered it, because I don't recall whether this cargo was loaded and on the water or what the details were as to the time of purchase and the manner in which it was purchased.

[Dep. p. 24]

Q. Do you think it was purchased by telephone conversation?

A. I imagine so. The majority of them were telephone conversations.

Q. How long at that time had you been in charge of the Southern Division of Atlantic Commission Company, Mr. Zeigler?

A. Approximately six and a half years.

Q. And during those six and a half years and prior to December of 1948, had you purchased other cargoes of Canadian No. 1 seed potatoes from Guy W. Capps, Inc.?

A. I believe I had; but to give you a positive statement, I would have to refer to my records on that.

Q. Well, according to your best recollection, had you not purchased one or more cargoes in each of the other preceding years and bought a similar commodity, Canadian No. 1 seed potatoes?

A. I don't recall whether or not we purchased Canadian No. 1 seed potatoes each preceding year; but it could have been, because that was something that was done regularly. It wasn't anything out of the ordinary.

Q. It wasn't unusual at all; the Atlantic Commission Company had been in the habit of making such purchases, had it not?

[Dep. p. 25]

A. By such purchases, what do you mean?

Q. I mean commodities, Canada No. 1 seed potatoes?

A. I would like to refer to the records before I give you a positive answer; but it is not out of the ordinary for seed potatoes to come in, Canada No. 1 seed potatoes, to come into these Southeastern ports, particularly during the planting season of the year.

Q. And the planting season for the Florida and Georgia and Alabama, and even South Carolina, is what season of the year, if you know?

A. I would say from December up through March.

Q. Of each calendar year?

A. That's right.

Q. Do you know whether or not Guy W. Capps, Inc., had been importing Canada seed potatoes for some prior years?

A. I believe he had.

Q. Mr. Zeigler, do you know anything about the planting of potatoes?

A. In what respects?

Q. Well, maybe it is better to ask the question. As I understand it, potatoes are planted by cutting the eye out of the whole potato, and it is the eye which is planted to produce the potato plant, which, in turn, makes the potatoes on its roots for harvest at the end of the harvesting season. Now, in general, is that correct?

[Dep. p. 26]

A. That is approximately my understanding of it.

Q. And there is no such thing as potato seed, as distinguished from a potato which is capable of using for seed?

Miss House. The plaintiff objects to that. I don't think this man has been qualified to testify as to potato planting or potato farming.

The Witness. I don't think I am qualified to go into that much detail.

Q. Well, now, Mr. Zeigler, concerning this particular cargo of potatoes: You brought them as Canadian No. 1 seed potatoes; and I note from your invoices, you also sold them as such. Is that not true?

A. That's right; I sold them as Canadian No. 1 seed potatoes. They were all invoiced as such.

Q. And when Atlantic Commission Company bought this cargo of potatoes from Capps, it became the owner of the cargo? The Capps Company no

longer had any control over the cargo or the disposition of the cargo; is that not true?

A. We took delivery of our portion of the cargo at the wharf in Jacksonville, Florida.

Q. Let me put it this way: You bought the whole cargo of forty-eight thousand plus number of bags contained on the ship, and it was within your option

[Dep. p. 27]

whether you chose to resell ten thousand of those bags back to Guy W. Capps, Inc., or not?

A. To answer the first part of your statement and question: I do not recall whether the number of bags we purchased on this cargo represented the entire cargo or not. I don't know that.

Q. But the number of bags which you purchased became the property of the Atlantic Commission Company, and Guy W. Capps, Inc., had no control whatever over the subsequent disposition of those bags?

A. Customarily, all potatoes that we purchased from Guy W. Capps, Inc., were invoiced, delivered, and paid for when they were laid down at the wharf, at point of delivery.

Q. When they were laid down at the wharf at point of delivery, they became the property of the Atlantic Commission Company?

A. That is right.

Q. And subject to disposition by the Atlantic Commission Company?

A. That is right.

Q. Is it not the fact that the Atlantic Commission Company, not only in that year but for many years prior to that time, had done a considerable volume of business in the resale of Canadian No. 1 seed potatoes?

[Dep. p. 28]

A. I cannot answer that question without referring to my records, because considerable volume, I would rather be accurate than to give you a rough estimate.

Q. Well, is it not within your knowledge that the Atlantic Commission Company, throughout the United States, in that year, sold as many as 250,000 bags of seed potatoes?

A. I do not know that.

Q. I suppose your sale of seed potatoes in the Southern Division depended upon customer demand for seed potatoes, did it not?

A. That is right.

Q. And the disposition of this cargo of seed potatoes reflected the customer demand for that commodity?

A. That is right.

Q. Now, a relatively small quantity, according to Exhibit B 13,627 bags, was sold to the Great Atlantic and Pacific Tea Company; that is correct, is it not?

A. State that question again, will you, Mr. Ashburn? A relatively small quantity of the *Gangway* purchase?

Q. Yes; that is what I mean.

A. Yes.

Q. And that quantity, the 13,627 bags was sold to the Great Atlantic and Pacific Tea Company as Canadian No. 1 certified seed?

[Dep. p. 29]

A. No, sir.

Q. How was it sold?

A. It was sold as Canadian seed potatoes.

Q. The omission being the No. 1?

A. Well, the omission being, "certified."

Q. Perhaps I am incorrect in the use of the word certified. That has a significance in the United States and actually I do not know whether it does in Canada. They were sold as Canada seed potatoes to the Great Atlantic and Pacific Tea Company?

A. That is right.

Q. Do you, yourself, have any knowledge of the subsequent disposition of the 13,627 bags by the Great Atlantic and Pacific Tea Company?

A. They were delivered to the A & P stores in the respective territories where they were shipped.

Q. And do you have any knowledge as to the designation of the commodity when it was resold by the A & P stores?

A. No; I don't.

Q. You were asked by counsel for the government concerning nonedible commodities which to your knowledge were sold by the A & P stores; and you mentioned seed potatoes, stating at the same time that those were as edible as any other potatoes were; and you mentioned onion sets. Concerning onion sets: They are not edible, are they?

[Dep. p. 30]

A. Not generally recognized as being edible; no.

Q. And sold primarily for planting?

A. Correct.

Q. And sold at retail in the A & P stores for planting? They are sold at retail in the A & P stores for planting?

A. That is my understanding.

Q. And do you know whether or not the purchasers are principally home gardeners; that is to say, householders who have small gardens?

A. I believe that that is principally so. There is one thought there: In suburban areas in some sections of the Southeast, it is my understanding, purchases of

onion sets and the like commodities, are not only made by home gardeners, but they are also made by people who plant, possibly, small commercial acreages.

Q. In addition to the home gardeners?

A. Yes, sir.

Q. Is it within your knowledge that the A & P stores sell at retail also cabbage sets?

A. Yes, sir; they do.

Q. And cabbage sets are sold, when they are sold in the retail stores, are likewise nonedible, are they not?

A. Yes, sir.

Q. Is it within your knowledge that the A & P

[Dep. p. 31]

stores, at the planting seasons in the various sections of the country where those stores are located, frequently advertise cabbage sets, onion sets, and seed potatoes to the retail trade?

A. I am not too familiar with that, that is retail again, but I believe they do.

Q. Mr. Zeigler, concerning the portion of the cargo of the *Empire Gangway* which was sold by the Atlantic Commission Company to the purchasers listed on Exhibit B, other than the Great Atlantic and Pacific Tea Company, and whom you classified generally as wholesalers: Your company, as seller, did not make any inquiry of those persons as to the use which those persons would put the seed potatoes to, did it?

A. No, sir.

Q. Do you have any personal knowledge of the business of any of those wholesalers, the details of the business of those wholesalers?

A. In what respect?

Q. Do you know whether or not that a great many of them sell seed potatoes to farmers?

A. I know some of them sell seed potatoes, yes; I don't know whether a great many. We have an awful long list there.

Q. It is within your knowledge that some of the

[Dep. p. 32]

persons or firms on that list do sell seed potatoes to farmers customarily?

A. Yes, sir.

Q. And you have never had occasion to make any inquiry as to whether or not the remainder sold seed potatoes to farmers?

A. No, sir.

Q. Now, Mr. Zeigler, the Atlantic Commission Company also purchases the harvested crop of potatoes grown in the United States, or a large quantity, at the harvest seasons in various parts of the country, does it not?

A. Yes, sir.

Q. What is the harvesting season for potatoes grown in Florida, Georgia, and South Carolina?

A. Florida is generally harvested—well, now, wait a minute; this is a pretty long state, when we use the word Florida. The early new varieties of potatoes generally come into production in South Florida in January. Your Hastings, Florida, potato crop is generally marketed in the months of April and May.

Q. Extending to June 15th, approximately, does it not?

A. It depends on the season. Georgia, of course, follows immediately after Florida; and South Carolina usually overlaps Georgia's production and sometimes Florida; and which will carry you probably up into June.

[Dep. p. 33]

Q. The harvesting season follows all the way up the coast to Maine, does it not?

A. Yes, sir.

Q. Where the season is customarily August and September?

A. In Maine?

Q. Yes.

A. Well, your harvest season in Maine would be a little later than that, I believe, Mr. Ashburn.

Q. Perhaps September and October?

A. Yes, sir.

Q. Do you know, Mr. Zeigler, whether or not growers of potatoes have a preference for Canadian seed as against American seed?

A. In many areas, they have.

Q. And the principal source of potatoes for planting in the United States is the Maine potatoes, is it not?

A. No; I don't believe that the principal source of your seed stuff is Maine. However, I am not really qualified to give you a reliable answer on that, because seed stocks of potatoes come out of Prince Edward, Canada, Maine, your Dakotas, and the Minnesota section; and I don't know the relative percentage of your Maine to the total—of your Maine potatoes to the total, that is, on the seed stuff.

Q. Do you know whether or not the Atlantic Com-

[Dep. p. 34]

mission Company was itself a grower of potatoes in 1948 and 1949?

A. To my knowledge, they were not.

Q. Well, do you mean by your answer that you have knowledge or that you do not know whether or not they were?

A. If they did grow any, I have never heard of it.

Q. Concerning the Jacksonville, Florida, area, Mr. Zeigler: Were you familiar with the government's purchases of potatoes grown in that area in 1948 and

1949? What I am interested in is when, as to the time of the year, when such purchases would have been made.

A. Do you mean under the support program?

Q. Under the support program.

A. I don't recall. I couldn't give you any specific answer on that.

Q. Did Mr. Baum, Mr. Harvey A. Baum, have anything to do with the purchase of the cargoes of Canadian seed potatoes from the Capps Company?

A. Inasmuch as he was my immediate superior, I counseled with him from time to time on potatoes purchased in large quantities.

Mr. ASHBURN. I believe that is all.

[Dep. p. 35]

Redirect examination by Miss HOUSE:

Q. Mr. Zeigler, you spoke of the buying in accordance with the customer demand for seed potatoes. Was this carload of potatoes that you bought from Mr. Capps bought primarily for seed purposes?

A. No. I think I mentioned earlier that they were purchased as potatoes.

Q. You testified, I believe, that your business is primarily buying foodstuffs, isn't it?

A. The majority of our purchases cover foodstuffs.

Q. And your client, which I now know is the Great A & P Tea Company, your client, the A & P is primarily a retailer of foodstuffs, isn't it?

A. That represents the great percentage of the business.

Q. The greatest percentage, isn't it?

A. Yes.

Q. And these other concerns that you have listed on Exhibit B, to your knowledge, are most of them wholesale food dealers or produce dealers?

A. They are wholesale produce dealers; but that covers—there are many types of distribution.

Q. But they are known primarily in the trade as wholesalers in food commodities, aren't they?

[Dep. p. 21]

A. In perishable commodities.

Q. In perishable commodities?

A. Yes.

Q. What is the significance of the word—I believe you have qualified here as an expert—what is the significance of the word, "seed"?

A. First of all, I disqualified myself as a potato expert. But for years, particularly in the Southeastern territory, it is the custom for potatoes to be delivered from Canada with seed tags or table stock tags on them. And at the planting season of the year there is, of course, an advantage in the potatoes that have seed tags on them because you have the opportunity to reach two types of purchasers, those for food and those who wish potatoes for planting purposes.

Q. And they are edible, as you have said?

A. They are both edible.

Q. You testified that the planting season here in Florida, I believe, runs from December through—?

A. No, ma'am. That was the harvesting season.

Q. When did you say the planting season was?

A. Well, your planting season would be approximately three to four months before that.

(The answer was thereupon read).

The WITNESS. That is misleading there. Your

[Dep. p. 37]

planting season in North Florida is in December and January; that is, extending into February, depending on the weather conditions.

Q. During that time, is it hard to purchase stocks of potatoes that you need in your business for food? Or do you find it difficult to buy stocks of potatoes during that time on the local market, I will say locally grown potatoes?

A. Not necessarily.

Q. Do you mean by that, there are still plenty of stocks of potatoes left over from the previous planting season that are available for purchase?

A. No; they don't normally hold potatoes over from one planting season to another. Many times, your growers in Hastings will bring in potatoes for seed purposes, and then, because of the weather or some other factor, decide not to put those potatoes in the ground; and then, those are sold on the market in the Southeastern territory for other uses.

Miss HOUSE. I believe that is all.

Re-cross-examination by Mr. ASHBURN:

Q. Mr. Zeigler, you say this cargo was brought for seed potatoes; but the purpose of the Atlantic Com-

[Dep. p. 38]

mission Company in buying the cargo was to resell them, was it not? They did not, themselves, intend to plant them, so far as you know?

A. Will you ask me one question at a time, now, so I can give you an intelligent answer?

Q. Was not the purpose of the Atlantic Commission Company in purchasing the cargo to resell the cargo?

A. Yes, sir.

Q. Do you recall whether or not each and every bag in the cargo contained affixed to it a tag showing that it was a bag of Canadian seed potatoes?

A. No, sir.

Q. Do you mean by that answer that it did not contain a tag, or that you do not recall whether it did?

A. I do not recall whether it did.

Mr. Ashburn. I think that is all.

Miss House. I believe that is all we have. Can we waive his signature?

Mr. Ashburn. Yes; we waive his signature.

* * * * *

[Transcript p. 36]

Mr. Ashburn. That was all, Your Honor.

Mr. Kovner. I believe that is all. The deposition closed.

May I just call the attention of the jury, if Your Honor please, when they have the deposition, to the

[37]

exhibits, and point out to them that there is listed as an exhibit the disposition of these potatoes to the various wholesale produce houses that the Atlantic Commission sold them to, and you will find that list in there. I do not think it is necessary to take up the time of the jury now to read the list, but they are sold to various produce dealers in cities and towns in Florida and Georgia.

If Your Honor please, before proceeding with my next witness, we have a list here which has been agreed to, as I understand it—I would like to mark for evidence as U. S. Exhibit 4, I think it is, a recapitulation of the parties, the produce companies and grocery stores to whom the defendant corporation resold the 10,000 bags of potatoes that it took of this total shipment.

Your Honor will recall that of the 48,450 bags that the defendant sold to the Atlantic Commission Company, it took back 10,000 bags at a certain price. We have here a list of the firms to whom these 10,000 bags

were sold in different lots. That has been agreed to.

Mr. ASHBURN. That is correct. The invoice is here, if you would like it.

Mr. KOVNER. I do not think it is necessary to come to the record with the invoice. The recapitulation will be sufficient.

The COURT. Let it be admitted.

[38]

(Said list of sales, so identified, was marked and received in evidence as "Government's Exhibit 4.")

* * * * *

[39]

Mr. KOVNER. If Your Honor please, before I call my next witness, and I hope the last, I should like to introduce some documents.

I have here to mark for identification, U. S. Exhibit No. 5, a certified copy of the executive agreement between the United States and Canada. That is alleged in the complaint. Certified by the Department of State.

The COURT. Is there any objection to it?

Mr. ASHBURN. No objection to it.

The COURT. That is the same thing that accompanies the complaint?

Mr. KOVNER. Yes, sir, Your Honor.

Mr. ASHBURN. If Your Honor please, by stating that there is no objection, I do not wish the record to indicate that we waive the position that we have taken that those documents are no agreement. We still contend that there are no agreements.

The COURT. I meant the authenticity of the papers that are produced now.

Mr. ASHBURN. I do not question it.

The COURT. You still reserve your exceptions to the legal effect of it?

[40]

Mr. ASHBURN. Yes, sir; Your Honor, and I would call attention to the fact that in the language it speaks prospectively something that the Canadian Government will do or intends to do, and it does not speak as of something accomplished.

Mr. KOVNER. Well, the meaning of the agreement would be something for Your Honor to rule on. I would like to have the text in, and if the jury cares to see it—I should also like, if the Court please, at this point to—well, I will not delay. I shall find it in due course, in a moment.

(The Clerk so marked the treaty so identified as "Government's Exhibit No. 5 for identification.)

Mr. KOVNER. I should now like to call as a witness Mr. George Grange.

Thereupon, GEORGE R. GRANGE was called as a witness by counsel for the United States and, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. KOVNER:

Q. Mr. Grange, will you tell the ladies and gentlemen of the jury your name and address and present position?

A. My name is George R. Grange. I live in Alexandria, Virginia, and I am presently employed as an

[41]

assistant to the director of the Fruit and Vegetable Branch, Production and Marketing Administration.

Q. How long have you had that position?

A. I have had that position since October 1950.

Q. And prior to that time what was your position?

A. Prior to that date, I worked in the Potato Division of the Fruit and Vegetable Branch. It is one of the commodity divisions of the branch.

Q. How long have you been employed in the Department of Agriculture, or since what date?

A. I started working for the Department of Agriculture in March—I forget the date, 1939.

Q. What is your professional status or title?

A. My earlier employment in the Department was as an agricultural economist. Since that time I have held different positions of different levels. My title has been changed to marketing specialist or agricultural economist. At the present time in an administrative capacity I am now serving as an assistant to the director of the branch. I am known as an administrative officer.

Q. What is your educational background?

A. I attended the University of Maine, graduated with a Bachelor of Science degree in agricultural economics and farm management, in 1937.

[42]

Q. Have you had any speaking acquaintance with the potato on account of your birth and childhood?

A. Yes. Practically all my childhood and adult life has been connected one way or the other with potatoes and the potato industry. I was born on a rather large potato farm, 475-acre farm, near a little town known as Smyrna Mills, which is in Aroostook County. I lived there all through my—while attending local schools, and I went from there to the University of Maine.

To follow that up perhaps a little bit, that leaves a gap of two years between there and my starting to work for the Department of Agriculture. I worked on the home farm for a good part of that time. I had various part-time jobs as most people in the potato industry were trying to take back during many of the years in the '30s, and I worked as a field supervisor for the Agricultural Adjustment Administration.

I also worked for seed companies, one winter. I spent approximately three months in Boston participating in a potato marketing survey that was conducted by the Maine Extension Service, marketing Maine potatoes in the City of Boston.

That is the way I occupied my time from June '37, when I finished school, college, until March, 1939, when I went to work for the Department of Agriculture.

Q. Will you tell us what your duties are at the

present time as an assistant to the director of the Fruit and Vegetable Branch? What sort of things do you do? I realize this can be in some detail, but I think it will be sufficient for the purposes here to qualify you as an expert.

Mr. ASHBURN. What is he supposed to be an expert on?

Mr. KOVNER. Mr. Grange will be offered as an expert in the Department of Agriculture on the growing, marketing, and distribution of potatoes, varieties of potatoes, and the operation of the price support program.

Mr. ASHBURN. Very well.

The WITNESS. I might say, if I may comment on that qualification, Mr. Kovner, my experience in the Department of Agriculture has been, so far as fruits and vegetables are concerned, to the Fruit and Vegetable Branch. The Fruit and Vegetable Branch is delegated the responsibility for conducting and administering any price support operation on fruits and vegetables. All marketing agreement programs on fruits and vegetables and related activities, having to do with the marketing work; for example, in this building we have a branch of our inspection office which handles all of the Federal and State inspection

on fresh fruits and vegetables. Another activity of the branch is all of the market news work, whereby the prices of potatoes in the various markets at shipping points and at terminal points throughout

(44)

the country are collected, as well as the volume, the loads, and the daily movement of potatoes and other fruits and vegetables to the market. That has to do with the marketing and handling of potatoes rather than the technical growing.

If I may offer in observation, I would not want to attempt to qualify myself as an expert on the type, the business type of fertilizer and insecticide that should be used. I am basically acquainted with it, of course, but that is handled by an experiment station, separate, a station setup rather than by—but so far as the price support operations, they were performed by the Fruit and Vegetable Branch and I have intimate personal knowledge of all of the operations under the price support program, and this related activity of the Canadian agreement that was entered into, attempt to implement and make more effective, that price support program.

By Mr. KOVNER:

Q. Did you take any part in the negotiations between the United States and Canada that led to the issuance of this executive agreement involved in this case?

A. Yes, sir. I did. I think it could be best described by saying that I functioned as the chief staff officer for the Fruit and Vegetable Branch in the negotiations that led to this agreement.

As you know, in order to effect an international agreement, it is necessary to deal through the Depart-

[45]

ment of State with the respective State Department of the foreign country.

Prior to reaching that, of course those of us who are interested in it, the representative from the Department of Commerce in Canada and the representatives from the Department of Agriculture in Canada, had a number of conferences and worked out the actual agreement that was adopted after we had reached an understanding as to what would be mutually agreeable. It was then that we moved over on into the more formal channels in order to get it officially adopted.

Q. Would you tell us, just briefly, what the work of the Department of Agriculture, as you come across it, is in connection with the compilation of figures and statistics concerning data on production and marketing in the United States, and exports and imports?

A. The work of preparing figures in the Department is divided into several different categories.

I am acquainted, generally, and rather know them very well, for all those that pertain to fresh fruits and vegetables. There are so many that we do directly ourselves in the Fruit and Vegetable Branch. There are others that are prepared by other offices within the Department. For example, your crop production reports that I presume most people are familiar with, is done by an agency known as the Crop Reporting Board of the Bureau of Agricultural

[46]

Economics. They issue regular, normally monthly reports giving the estimate of acreage planted, yields per acre and total production for all of the major commodities by States or by other more detailed breakdown in some instances.

The figures that are handled by the Fruit and Vegetable Branch itself has to do with this Market News activity largely that I referred to earlier. There we are concerned with the trading and shipment of potatoes rather than the production at the farm level which the crop report confines itself to.

I can give you two or three specific illustrations of the type of thing that is done and the manner in which they are collected.

For example, there are 100 major cities in this country where representatives of the Fruit and Vegetable Branch, where we obtain information directly to the Fruit and Vegetable Branch. We maintain daily and monthly and weekly figures as to the number of carloads received of each of the major fruit and vegetables in that market each day, and the number of diversions from that point, so that we can calculate the volume being unloaded at that point.

This is disseminated throughout the country on a very massive communications system, teletype, largely, to all of the people engaged in the produce industry.

It is important to know the number of carloads of

potatoes arriving in New York City on a certain day, or the number of carloads of lettuce, so that they can best manage and handle their regular commercial affairs. Incidentally, it is entirely for that reason that it is collected. The use of these figures by the Government itself is purely secondary. It is simply a service agency to provide the trade with these figures.

Another related function that is performed in the same manner is the wholesale shipping price for giving the daily prices by various grades and various varieties of potatoes and other fuits and vegetables

in all these terminal markets. There are issued, in terms of daily bulletins to the fresh produce industry all over the country, for their information, advice and guidance, in trying to market this perishable rapidly moving crop in the best manner that they possibly can.

There is more done on fresh fruits and vegetables, I believe probably, in the terms of up-to-the-minute, up-to-date information than practically any other agricultural product because, if you have a corresponding load of something that is perishable and will be out of condition within a matter of hours, in some cases, a matter of a few days, in all cases it is necessary to have all the information you possibly can in order to be able to handle that effectively.

Q. Mr. Grange, unless there should arise some

[48]

question on your qualification as we get into specific questions, I should like to direct your attention now to some of the matters involved in this case. Would you tell me first what the official report was on the potato crop in the United States in 1948?

A. The 1948 crop was the largest on record by a considerable margin and as I recall it was approximately 454,700,000 bushels.

Q. What was the 10-year average prior to that?

A. The 10-year average is approximately 410,000,000 bushels, Mr. Kovner.

The COURT. It was how much?

The WITNESS. 410,000,000 bushels, Your Honor.

By MR. KOVNER:

Q. Mr. Grange, can you tell us what the official record was as to the potato crop for 1948 in Canada?

A. Yes. The Canadian crop was also a record. It was approximately 92,000,000 bushels. The 10-year

corresponding average, as I recall, is in the neighborhood of 70,000,000 bushels.

Q. Mr. Grange, part of your duties include the operation, the administration, that is to say of the potato price support program?

A. Yes. It did, sir. That was one thing I omitted in your earlier question as to what some of my past duties had been.

[19]

During the last year and a half or two years that I was in the Potato Division before being transferred to the director's office in the branch, I was chief of what is known as the Program, Appraisal and Development Section. We had three sections. This one had a rather long name but it meant that you just had to go about the business of drawing up the plans for operating these programs. We were charged with the responsibility for the initiation of all plans, all recommendations, any activity pertaining to the price support operations on potatoes. I was the chief of that section for the last year or two that I was there. Prior to that I worked as an economist in the section. At one time we had what we called an Economic Section, and I was chief of this section all of the time since about 1947, although my title changed a couple of times, I was doing practically the same type of work within that division.

In addition to developing the plans for it, we had this appraisal part of it, too. We were supposed to keep, and we did keep, under my direction and supervision, all of the records pertaining to the operation of the price support program, the operating records, as we call them, the fiscal branch, of course, kept the final records as to actual Government disbursements, but they were too slow for us. Like I explained before, this is a fast-moving operation. We had to

[50]

know, week by week, what the surplus was, where it was going, some of the outlets were where we might be able to dispose of the potatoes, so we kept a very complete operating records on the price support program, which is part of the job, as well as developing the plans.

Q. Yes. Can you tell us, in 1948, prior to November 23, 1948, which is the date of this Executive agreement, what, if any, restrictions were there upon the importation of potatoes from Canada into the United States?

A. There were no restrictions except for those imposed under the general agreement on tariff and trade of 1948 which set up the tariff rates and the quotas at different rates for table stock potatoes, and certified seed potatoes, separately.

Q. Did those quotas limit the quantities of potatoes that could be imported from Canada into the United States?

A. No, Mr. Kovner, if they had, there would have been no point in the Executive agreement.

I can tell you briefly what the rates were and what the quotas were.

Q. What did the quota measure?

A. I beg your pardon?

Q. What did the quota measure?

A. How much was it?

Q. Go ahead in your own words and tell us what these tariff arrangements were.

[51]

A. The tariff agreement provided:

That for the first 1,000,000 bushels of table stock potatoes imported into this country from any country, about 99 percent of them come from Canada, that for the first 1,000,000 bushels of table stock potatoes, the

duty will be 37½ cents per 100 pounds. After that quota has been reached and passed, the duty is doubled to 75 cents per hundredweight.

The duty on certified seed is 37½, the same as for the first 2,500,000 bushels. After that quota has been exceeded, the duty becomes 75 cents. That is renewed, Mr. Kovner, each year. The tariff year starts on September 15 of each year which is about the beginning of the marketing year for the Canadian crop and then each September 15 it drops back to the original 37½ cents starting point.

They keep very detailed records at the Bureau of Customs as to entries. At the time the quota is reached the duty is increased up to the 75 cents. But there is no limitation at all as to the maximum quantity that could be imported so long as that duty was paid. They could bring in as many potatoes as they desired, either table stock or certified seed.

Q. What is the price of the Canadian potatoes, certified seed potato, or table stock potato? Lower to the American, United States importer, than comparable domestic potatoes, even with the payments of

[32]

tariff and freight, in 1948 and 1949?

A. I believe that is a matter of record, Mr. Kovner. I am trying to conduct myself properly here. I believe that the statistics that we have from Canada, which, incidentally, also is part of my job to know what is going on in some of these other places, because they have such a direct bearing upon our activities, will show that the price of the Canadian certified seed even after payment of the 75 cents duty, was considerably lower than the price of either United States No. 1 table stock potatoes or certified seed potatoes in this country.

Q. Do you happen to know what the freight rate is for 100 pounds, if that is the measure used of potatoes by rail from Maine to Jacksonville, Florida?

A. Yes, sir. In January, 1949, it was $1.37 per hundredweight.

Q. Do you happen to know what the charge is by water for shipment from Prince Edward Island to Jacksonville, Florida?

A. Mr. Kovner, that is a difficult question to answer, because the water freight rate out of Prince Edward Island varies quite a bit because you are permitted to use foreign bottoms so that often they could pick up a ship that would bring potatoes from Canada into a port on the Eastern Seaboard for a, by a

[53]

normal measure, a ridiculously low price. Not the amount the freight is indicated on the invoice in this particular case, sir.

Q. That shows on the invoice at about 40 cents.

Mr. ASHBURN. This was a United States Shipping Board vessel, wasn't it?

Mr. KOVNER. If Your Honor please, I do not know. I know the rate was 40 cents for 100 pounds.

Mr. ASHBURN. Owned by the United States Government, wasn't it, that bought these potatoes?

Mr. KOVNER. I cannot say, but I will stand on the freight rate that showed on the invoice.

The WITNESS. I know of instances where they paid as low as 15 cents a hundredweight, Mr. Kovner, but in any event, that is compared with $1.37 rail rate from Presque Isle, Maine, which is the major shipping point in Maine, to Jacksonville, Florida.

By Mr. KOVNER:

Q. Do you have any opinion, then, in the light of these facts, as to what the possible effect would be of

the record crop of potatoes in Canada in 1948 upon the price support program?

A. Yes; if I may, I can trace briefly for you the development of the agreement itself.

Mr. ASHBURN. Your Honor, that might be interesting, but how germane is it?

[54]

The COURT. I did not understand you.

Mr. ASHBURN. All of this may be interesting, but how germane is it to the issues to which we are involved?

The COURT. I think your probable earlier part was all off but I believe you are getting down now to what is germane.

Mr. ASHBURN. All right, sir.

Mr. KOVNER. I think this is germane. In true respects it shows the agreement was important to the United States and the contract entered into. It was also dealing with the quantities that could be measured and could bear upon the proof of damages.

The COURT. All right.

By Mr. KOVNER:

Q. My question, I think, was: Did you have an opinion as to what would be the effect of the record Canadian crop upon the potato price support program in 1948 and 1949, prior to November 23, 1949?

A. Yes, sir.

Q. Will you tell us what that opinion was?

A. We anticipated extremely heavy imports of Canadian potatoes in such quantities that they would materially affect the price support operations and result in an according increase in the cost of carrying out this Government program in this country.

[55]

Q. Would you explain as briefly as you can how that would increase the costs? How could the importation of potatoes for table stock, from Canada, increase the costs of the potato price program to the United States?

A. Well, that is obvious with an all-time record crop in the United States, and an all-time record crop in Canada, that the Department of Agriculture, and specificially the Fruit and Vegetable Branch, was heading for trouble in maintaining the prices at the required levels for that crop year, and there was no crop support program in Canada. Their surplus in terms of percentage was approximately as great as the surplus in this country, so that it would have the same corresponding depressing effect upon the domestic prices up in Canada. They would have no alternative except to support them. The domestic market here would be maintained by the purchases that were made and the price support program.

We used to refer to it, Mr. Kovner, as the price support umbrella that we held over Canada. At the same time we were carrying out our legal obligations in this country.

Q. I just wanted to be sure that the Court and the jury will understand that.

How, if a million 100-pound bags of potatoes came in from Canada that could be sold out for table stock or for seed purposes but could get in the table stock

[56]

market—how would that increase the cost to the United States?

A. Well, we made a very accurate guess before the beginning of the season, to show how many potatoes we

were going to have to buy in the United States, just based on the size of the crop, and taking into account the size of the Canadian crop.

Q. What did that cost to the United States depend upon?

A. It depended upon the potato supplies, the potatoes that we had in this country, and we were doing everything under our power to get the production in this country reduced by acreage allotments and contracting dealers.

We do not do anything about what they were growing in Canada. It did not matter, Mr. Kovner, where the potatoes come from so long as we had potatoes in this country in the amount of 130,000,000 bushels in excess of our requirements, which approximately there was. We would have to buy 130,000,000 bushels. We would not buy the potatoes from an ineligible grower who exceeded his allotment, or we would not buy Canadian potatoes which were also ineligible, but they were fed into the market, into the wholesalers, the retail stores, the distributors, or to the housewife. It meant simply one thing, that that same amount of potatoes that came from that source would replace an equivalent amount of potatoes that would have otherwise been sold by the eligible growers, commercially, and, therefore, the Commodity Credit Corporation

[57]

would not have had to purchase them.

Q. Mr. Grange, you expected that the Executive agreement would result in the curtailment of the importation of potatoes from Canada into the United States, that would find their way to the stock market?

A. Yes, sir.

Q. The agreement permits the exportation into the United States of certified seed potatoes?

A. Yes, sir.

Q. Yet under the agreement, Canada would, however, grants no permit for the exportation of table stock potatoes?

A. That is correct.

Q. Is the seed potato an edible potato?

A. Yes, sir.

Q. How does it compare—is it a good eating potato?

A. Yes. If I may, I might tell briefly the difference, or what is certified seed. It might be helpful, sir.

The only difference between table stock potatoes and certified seed potatoes is that certified seed potatoes, you know something about the plant. You know what the inherent disease in that potato is. You can't tell it by looking at two potatoes, but if you inspect them in the field while they are growing, the different virus diseases, wilt, black leg, and so forth, can be identified in those plants. You pull those plants out. Those potatoes are all discarded. If you have

too many, the whole field is out. It cannot be certified. Therefore, those potatoes will have sturdier, healthier progeny if they are planted. You can take any potato and a potato will sprout. You don't plant the eyes. You cut the potato and plant the whole chunk, an inch and a half or two inch chunk, and it probably will sprout and grow. But if it is loaded down with disease, you will not get the quality or the yield that you will get from a good top grade, certified seed potato that is extremely low in these terrible diseases. That is the distinction between the two sir.

Q. Did you know that the Canadian certified seed potato imported from Canada without any restric-

tions, prior to November 23, 1948, could be diverted to table stock by the United States importer?

A. Yes, sir. That was the reason for these restrictions on the use of the certified seed.

Q. The Executive agreement provided in order to restrict——

Mr. Ashburn. I object to the use of that term, these restrictions on the use. The agreement does not contain any restrictions on the use anywhere in its language of the potato.

The Court. The agreement——

Mr. Ashburn. Speaks for itself.

The Court. (Continuing.) Placed an embargo on

[39]

table potatoes.

Mr. Kovner. That is correct.

The Court. Placed an embargo on seed potatoes unless the Canadian exporter has a firm contract with the American importer and the American importer assures in his contract that they will be used only for seed potatoes. That is as far as it goes.

Mr. Ashburn. That is not correct, Your Honor.

The Court. Not to be diverted or reconsigned.

Mr. Ashburn. That is quite a different thing, if Your Honor please, will not be diverted or reconsigned for table stuff.

The Court. We are in agreement on that.

Mr. Kovner. I think the language of the Executive agreement speaks for itself, as we say, and then perhaps it would be best to read it at this point, just exactly what it says.

The Court. The knowledge of it is that the importer be given assurance that the potatoes will not be diverted or reconsigned for table use.

Mr. Kovner. That is the nub of it and the language of it.

Mr. ASHBURN. Except for this, if Your Honor please, if I may make the observation, that is what Canada said it would require from the exporter and

[60]

it never did require it from the exporter at any time.

The COURT. The embargo as to seed potatoes is lifted only on condition that the exporter would require the importer to include in his contract an assurance that he will not divert or reconsign the potatoes for table use.

Mr. ASHBURN. That is still not correct. It may be tweedle-dum and tweedle-dee.

The COURT. Canada requires that of the exporter.

Mr. ASHBURN. No. Canada said that if the United States would perform certain conditions, it would be willing to require it of the exporter. Actually, it never did require it of the exporter and actually this trade agreement ended in June 1949.

The COURT. That is aside from what is in the agreement?

Mr. ASHBURN. No, sir. That is the language of the agreement.

The COURT. No; but what Canada did under it is aside from it.

Mr. KOVNER. That is correct.

The COURT. What actually is in the agreement.

Mr. KOVNER. That is right, Your Honor. We placed in evidence the telegram.

The COURT. I think that is correct.

Mr. KOVNER. The telegram contains the statement

[61]

which we say is within what is intended to convey, the assurance. Your Honor so ruled in the motion to dismiss, that the telegram which is in evidence which Capps, Incorporated, sent to Willis, the Canadian seller, that these potatoes loaded on the S. S.

Empire Gangway for planting in Florida and Georgia, could have only one reasonable meaning; that that was intended to meet the requirement of Canadian law, that there should be assurance that the potatoes would not be diverted to table stock.

The COURT. What is your question?

Mr. KOVNER. I think I can leave my question at this point and go forward.

By Mr. KOVNER:

Q. Mr. Grange, do you know the extent of the production of potatoes in 1948 in the United States that was under acreage agreement limiting the quantity of potatoes to be produced?

A. Under our acreage allotment program?

Q. Yes.

The COURT. What was that question again? Do you know what?

Mr. KOVNER. The extent of production, percentage of potatoes produced under quota that is under acreage allotment, production for the crop year 1948.

The WITNESS. Of the total planted acreage in the

[62]

country—I am referring to commercial acreage because we did not try to get down into each little garden patch—we said anyone could grow up to three acres and considered to be in compliance with the price support program. That is part of the regulation.

In the commercial production, there was in the neighborhood of 80 percent of the total planted acreage in the United States which was grown within the farm acreage allotment issued to an individual farm.

By Mr. KOVNER:

Q. 80 percent?

A. 80 percent.

The COURT. Will you say that again?

The WITNESS. Your Honor, there was approximately 80 percent of the potatoes grown in the United States in 1948, was in compliance with the acreage allotment issued on that farm. They did not plant over what we issued to them.

Mr. ASHBURN. 20 percent did plant over those? Does that follow?

The COURT. As I understood it, 20 percent of the production of potatoes was not within the quota system.

The WITNESS. Yes, sir.

Mr. KOVNER. 20 percent not within the quota system in 1948? What was the figure for 1949?

The WITNESS. We kept cutting these allotments,

[63]

Mr. Kovner. Let me, before I give you the figure—we kept cutting these allotments in order to try to get this production down within some reasonable bounds so the support program would not be so extremely costly. We spent over 500 billion dollars on it, as you probably know, as we kept decreasing these allotments. The compliance kept getting poorer and poorer, because we did not have the tools to keep them within bounds.

We started out with the individual farm allotments in 1947 and we measured all the farms that year and just a little over 90 percent of the acreage was in compliance. The 1948 figure of 80 percent has already been given to you. Incidentally, that is an estimated figure because we didn't measure them all that year. In 1949, however, we again measured all the farms. Just let me refresh my memory. I think I made a note of that. We had 71 percent of the acreage in this country in compliance with the acreage allotment.

By Mr. Kovner:

Q. What is the crop year? What is that period?

A. They start planting potatoes—it is a rather long period. They start planting potatoes on the southern tip of Florida along in September for that Christmas trade that they get.

Q. September of what?

A. September of—let's talk about this crop year.

[64]

It's the 1952 crop that we are in, if you wish.

Q. To make it easier for me to understand, what was September, of what year, for the 1948 crop?

A. September 1947, and they were—complete the planting about June of 1948, in the late northern States. That would be the planting year.

Q. That is the planting year?

A. Now those potatoes, after they are dug, in the northern States, a very high percentage of them go into storage and they are sold throughout the fall, winter and the spring months. They would be sold all through the fall and winter of '48 and '49, after they were dug in September and October of '48.

Q. Mr. Grange, did you keep figures, carlot shipment of potatoes, that came into Jacksonville, Florida, in January, 1948?

A. Yes; that is one of the hundred cities that I referred to where we have arrangements for the railway agent for each of the railroads to report it to us, the arrivals and diversions from that point. And so our records show there were 58 carloads of potatoes unloaded in Jacksonville, in January, 1948.

Q. January 1948. Can you tell us, of those carloads of potatoes, where these potatoes came from?

A. Yes, sir. These records that are submitted to

[65]

us show by days the State of origin of each of the

cars of potatoes that have arrived in each of these cities. In this particular case of the 58, there were 30 cars that came from Idaho, 15 from Maine, 2 from Michigan, 4 from Minnesota and 7 from North Dakota. They make up the 58 cars.

Q. The support price that is paid for potatoes that come into Jacksonville from Idaho is the support price paid in Idaho; is that correct?

A. Yes, Mr. Kovner. We'd have no support price as such, in Jacksonville itself. When our support operation operated back in the country where the potatoes originated, because we were trying to get rid of them—we would not want to buy potatoes in New York City or Chicago or Jacksonville—so the support price would apply from the State where the potatoes came from.

Q. Is that support price as known in the Department of Agriculture?

A. Yes. That is a matter issued each year and published in the Federal Register, giving notice of the provision of the program.

Mr. KOVNER. If Your Honor please, there is no need to prove it by evidence, but I think it will be helpful at this point to refer to Volume 6 of the Code of Federal Regulations (1949 Edition), Section 648.64. That is the 1949 Edition of the Code of Federal Regu-

[66]

lations, official regulations, and that is Section 648.64 of Volume 6 of the Federal Regulations, shows the support price per 100 pounds for potatoes by State. The producing states are listed in one column and then by the months of the year, 1948, beginning in July, running to August, September, October, November, December, and in 1949 January, February and March. So that we have by law in the Code of Federal Regulations, fixed by law, the specific price per

hundredweight for potatoes coming from Idaho, Maine——

The COURT. What was the support price, Idaho, in January 1948?

Mr. KOVNER. In January 1949——

The COURT. 1949.

Mr. KOVNER. If Your Honor please, the support price was $3.05. The support price in January 1949, for potatoes coming from Maine was $3.15. The support price from Michigan was $3.10. The support price from Minnesota was $2.80. The support price for potatoes coming from North Dakota was $2.80.

Now I have here, for the convenience of the Court and the jury, a table which shows that weighted average support price, which I should like to put in evidence.

Mr. ASHBURN. May I see it?

The COURT. What do you mean by the weighted average?

[67]

Mr. KOVNER. There is a total of 58 carloads that came into Jacksonville, Florida, in January 1949. Of that 58, 30 carloads came from Idaho, that is to say, some 51 percent; 25 percent came from Maine; 3½ percent came from Michigan; nearly 7 percent came from Minnesota, and just a little over 12 percent came from North Dakota.

Now if we take the support price shown by law, the legal support price for each of those areas and measure it by the percentage, we get the weighted average support price for potatoes coming into Jacksonville, Florida, in January 1949, giving weights, that is to the relative proportion of quantity of potatoes from their point of origin.

I would like to mark that United States Exhibit 6.

The COURT. That is just a tabulation?

Mr. KOVNER. Of official figures; just does arithmetic.

Mr. ASHBURN. If Your Honor please, my position about it is this. It has no relevancy in the case, that is, no place as an exhibit, because the simple fact is, as the witness stated, there was no support price applicable to potatoes which the grower had sold in commercial channels. These 58 carloads of potatoes were no responsibility of the United States Government. They had been sold by the grower. They could not have gotten in commercial, if they had not. The support program, as I understand it, is that the

[68]

Government will take the potatoes from the grower and pay him its support price if he does not sell them commercially. It goes no further than that, and I think the statute itself is plain on that.

The COURT. Takes it at the farm?

Mr. ASHBURN. Yes, sir.

Mr. KOVNER. That is correct, Your Honor, but two things have to be said, it seems to me, to what has just been said by Mr. Ashburn. The first is that the support price is a guarantee of the commercial price because that is what its whole purpose is. That is the whole purpose of the support price, to guarantee the price received in the commercial market. These potatoes will sell for at least this much because if the seller of these potatoes cannot sell them for $3.05 in the market, he can sell them to the United States for $3.05.

Mr. ASHBURN. Correct, but what does that have to do with the 58 carloads that went into Jacksonville? They had been sold in commercial channels.

Mr. KOVNER. Precisely this, if Your Honor please, that our theory of the measure of damages is that these Canadian potatoes displaced an equivalent quan-

tity of domestic potatoes that would have been sold in Jacksonville, Florida. You have to provide an approximate reasonable guide to the measure of damages and what we are saying is——

The COURT. All you are interested in is showing

[69]

that 58 carloads came into Jacksonville?

Mr. KOVNER. 58 carloads came into Jacksonville and what the average support price is for those. It is a mere matter of arithmetic for the official figures. What use we will make of this evidence, I think we can perhaps discuss later, but it is in the——

The COURT. I will let it in.

(Said table of figures, so identified, was marked and received in evidence as "Government's Exhibit No. 6.")

By Mr. KOVNER:

Q. Mr. Grange, I think in view of the fact that we are dealing here with a problem of marketing of the total crop, it might be helpful if you will tell us what the arithmetic is of the average net cost to the United States in the whole 1948 potato price support program of 100 pounds of potatoes—for the potato price support program of 1948.

The COURT. Average support price?

Mr. KOVNER. This is the net average cost in the United States and the whole operation for the year 1948.

The COURT. Average support price of 100 pounds throughout the United States.

Mr. KOVNER. If Your Honor please, it is not the support price. It is the net cost after the United States took in whatever it had by way of disposing of the potatoes.

[70]

The COURT. The net cost of the United States.

Mr. KOVNER. Net cost, the United States, per 100 pounds.

Mr. ASHBURN. Let me understand it, Your Honor. Does that figure include also, all of the salaries of the employees of the Department of Agriculture, all of the wages that they have paid to men who burned the potatoes and for the trucks that hauled them out and poured gasoline on them?

The COURT. What are the items of cost involved in there in addition to the purchase?

Mr. KOVNER. Mr. Grange knows that better than I do.

By Mr. KOVNER:

Q. Will you tell us what items of cost are involved in that net cost figure? Just tell it to lay people.

A. I will be glad to. No wages paid for burning, incidentally, because none were burned. But the cost includes the commodity cost, what we paid for the potatoes themselves, plus freight and transportation to get them some place, if they were going to be used for starch, livestock, feed, alcohol, school lunch programs, export, those are the major outlets. From that, that comprises the total cost. There is no administrative expense figured in these costs at all. This is just program cost, not administrative Department of Agriculture cost. From that is subtracted what we got back from the potatoes. Some potatoes have very little

[71]

value unless they are eaten or planted, which is what they are meant to be done, so the recovery was rather nominal, but that is what is covered in these net cost figures, Your Honor.

Q. Could we have what that net cost was for the 1948 potato price support program, net cost per 100 pounds?

The COURT. Tell me about this net cost. Is he deducting from the commodity cost the salvage of the potatoes?

Mr. KOVNER. That is correct, plus additional costs. In addition to the price, you have to pay for the potatoes.

The COURT. Takes the commodity cost and adds to that the several costs?

Mr. KOVNER. Freight handling.

The COURT. Deduct from that the salvage costs?

Mr. KOVNER. That is right, Your Honor. It is the total price the United States had to pay for the potato handling and disposing of them, storing them, less whatever ——

Mr. ASHBURN. There are two answers to that, if Your Honor please. No. 1 is the United States did not have to buy any, and No. 2 is, as long as the English speaking law has been enforced in these courts that anyone who claims he is damaged must attempt to minimize his damages which he could do by putting those potatoes on sale at some figure. If they were bringing $3.10 on the market, if he offered them at $3; they would sell, or $2.75. The Government says, no, we won't sell them because we wanted to hold

[72]

the price up to $3.10, but that doesn't entitle him to claim damages because he held the price up to $3.10.

The COURT. I will let the evidence in, subject to an attack, of course.

Mr. KOVNER. All right.

The WITNESS. May I proceed?

By Mr. KOVNER:

Q. Would you tell us what that net cost is? Just give us that figure.

A. The average per 100 pounds was $2.74 per hundredweight. That includes U. S. No. 1, U. S. No. 2,

and culls on which we paid nothing and suffered no loss. That is just figured on the total quantity that we acquired.

Q. The Canadian certified seed potato was comparable to the United States No. 1?

A. Yes, sir. Roughly, it is quite comparable.

Q. Mr. Grange, can you tell us what the supply of seed potato in the United States was? That is domestic grown certified seed potatoes used, suitable for planting——

Mr. ASHBURN. How is that relevant, if Your Honor please?

Mr. KOVNER. If your Honor please, I will show that is quite relevant to the theory of damages in this respect: The defendant has argued that if these seed potatoes had been, that were imported here, 48,450 100-pound bags of seed potatoes, planted for seed—

[73]

assuming that there would have been many more potatoes in the United States——

Mr. ASHBURN. There would when they were harvested, wouldn't there?

Mr. KOVNER. Many more potatoes in the United States than the 48,450 100-pound bags because a potato, when planted yields, I don't know—some figure—whatever it is, but it would be many more and the defendant, therefore, seeks to urge, will argue, has already argued, and so alleges in the complaint—in its answer, rather—that there was not any damage to the United States, that these potatoes were diverted to table stock, in fact, it was a benefit.

Mr. ASHBURN. I said if there were.

The COURT. Go ahead.

Mr. KOVNER. There could have been. The defendant says there could not have been any damage to the United States if these potatoes were diverted

to the table stock, it was in fact, a benefit to the United States by the defendant not doing what he said he would do in this agreement, because it cut down the entry of the potatoes that would have been in the United States if the potatoes had been planted. That is the premise of that proposition that planting potatoes produces many more.

The COURT. What is your question?

Mr. KOVNER. I will attempt to show in answer to

[74]

that argument, that the importation of Canadian seed potatoes into the United States, if used for seed, would not in any way hurt the United States, would not add to the volume of potatoes in the United States one bit because there was already a surplus of seed potatoes in the United States. In other words——

The COURT. All right.

Mr. KOVNER. In other words, the importation of Canadian seed potatoes do not increase the amount of potatoes planted in the United States.

The COURT. Because it would not cause any more to be planted.

Mr. KOVNER. Exactly. So because there was more ample supply of certified seed potatoes in the United States——

The COURT. You want to show now what was the supply in the United States?

Mr. KOVNER. What was the average, and show that surplus.

The COURT. All right.

[75]

By Mr. KOVNER:

Q. Mr. Grange, I believe I was trying to find out from you the surplus of seed potatoes in the United States for the crop year 1948. Perhaps we can shorten it by my asking you, was there a surplus of

seed potatoes in the United States for the crop year 1948?

A. Yes, sir. There was a very great surplus of certified seed potatoes in the United States.

Q. Was there a surplus of seed potatoes in the United States for the crop year 1949?

A. Yes, sir; there was.

Q. Was that a surplus of seed potatoes resulting from the United States production of certified seed potatoes?

A. That is correct, Mr. Kovner. The 1948 crop, of course, is used for planting the '49 crop. You use the '48 seed to plant for harvesting the following year. As I remember the figures, there were approximately 48,000,000 bushels of certified seed potatoes produced in the United States in 1948, and the total seed requirements were about 30,000,000 bushels, a large part of which in all probability were not certified seed, so that roughly the excess of certified seed in this country above our requirement was about—we had double the amount of seed that we needed, whereas our surplus of table stock was only about 30 percent.

Q. What are the figures for the crop year 1949?

[76]

A. The production of certified seed, and the requirement; were almost the same. I would have to look at the official crop report of certified seed to give you the exact figure.

Q. What document do you need to refresh your recollection? What document is that, Mr. Grange?

A. That is a document there which contains the Department of Agriculture estimate of certified seed production. You also find it, Mr. Kovner, in an agricultural statistics book that you have there.

Q. If I give you that, can you find it from that?

A. Yes, sir.

The COURT. What is the question?

Mr. KOVNER. The question is, What was the surplus of seed, domestic production of seed potatoes for the crop year 1949? We have had it for the crop year 1948.

The WITNESS. Mr. Kovner, the production of certified seed potatoes as shown here in the United States in 1949 has 48,428,000 bushels as compared with 48,317,000 the preceding year.

By Mr. KOVNER:

Q. And the requirements were?

A. In the neighborhood of 30,000,000 bushels of all seed, sir.

Q. Mr. Grange, do you know, did the Department of

[77]

Agriculture give notice, public notice, of the execution of the trade agreement, Executive agreement, with the United States and Canada?

A. Yes, sir. There were joint releases, press releases issued by the State Department and the Department of Agriculture.

Mr. KOVNER. If the Court please, I have here a certified copy of that press release which will show notice given to the public and the trade.

The COURT. How was the notice given?

Mr. KOVNER. In the form of press release, given to all the papers of the United States.

Mr. ASHBURN. That is language when you say——

The COURT. Is that a certification of newspaper?

Mr. KOVNER. No; it is a certification of the press release issued jointly by the Department of State and the Department of Agriculture.

The COURT. Does it say how it was published?

Mr. KOVNER. It is in the conventional form of press releases for release on such a date.

The COURT. Show it to counsel and see if he has any objection to it.

Mr. ASHBURN. What is Your Honor's question to me concerning it?

The COURT. I just want to see if you have any objection to it.

[78]

Mr. ASHBURN. Yes; I do. For what purpose is it tendered?

Mr. KOVNER. I tender it to show the purpose, the Department of State and Department of Agriculture gave notice to the public of the execution of the agreement in the course of their official duties.

The COURT. When did they give notice?

Mr. KOVNER. The press release is dated, Your Honor, November 26, 1948.

The COURT. Does the certificate attached to it show that it was in fact published?

Mr. ASHBURN. No, sir.

Mr. KOVNER. If Your Honor please, the publication in the papers would depend upon the individual papers throughout the country, how much of that they were going to pick up and put in their papers.

The COURT. Was anything certified that it was given to the papers?

Mr. KOVNER. That it was given to the papers. The document speaks for itself that it was given to the press. Yes, sir, Your Honor.

Mr. ASHBURN. Let us understand that. Here is what I understood it to mean. That or November 26, 1948, someone in the Department of Agriculture

[79]

laid down this paper to those newspaper reporters who chose to come around and see if there was any

news that day. Those news reporters wrote so much of it as each individual chose to write to be published in his paper. They may have represented Washington and Philadelphia papers, and Associated Press, but there doesn't show anything concerning the actual publication of it.

The COURT All this purports to do was to show that this was handed to the newspaper reporters?

Mr. KOVNER. That is right, trade papers and public papers as well.

The COURT. For such use as they——

Mr. ASHBURN. Chose to make of it.

Mr. KOVNER. That is right.

The COURT. I will let it in for that understanding.

Mr. KOVNER. That is United States Exhibit 7.

(Said press release, so identified, was marked and received in evidence as "Government Exhibit No. 7.")

Mr. KOVNER. If Your Honor please, I should like to offer in evidence as a matter to be approved—well, if Your Honor please, I would like to show that I have here a certified copy, if Your Honor please——

The WITNESS. That is material I placed there, sir.

Mr. KOVNER. If Your Honor please, I will go on, I think. Just let me have a few minutes.

If Your Honor please, I should like to exhibit and

[80]

identify—I would have to have a photostat made or typewritten copy, but this is the Canadian Gazette, which is taken from the Library of Congress, the Congressional Law Library. It is the statutory order and regulation, and it shows an order, export and import permits, account potatoes, added to the list of goods under export permit control at the Government House at Ottawa, Friday, the 26th of November 1948. His Excellency the Governor General, in council, on the recommendations of the Minister of

Trade and Commerce, is pleased to amend the list of goods under Section 5, shall apply as established by order, in council, of the 14th of May 1947 (P. C. 1893). It is hereby further amended by adding to Group 1, agricultural and vegetable products, the following items: Potatoes of all kinds. A. D. P. Hinley, Clerk of the Privy Council.

I offer that as proof that Canada went ahead with the execution of the Executive agreement and placed potatoes under the Export Permit Control Act on November 26, 1949.

The COURT. Do you want to file it?

Mr. KOVNER. May I say that the copy I have read into the record will perhaps be sufficient.

The COURT. You have leave to withdraw it, if you want to, and substitute a copy of it.

Mr. KOVNER. May I have that leave? Thank you very much, because this is the Library of Congress' copy.

[81]

The COURT. All right.

Do you have any further questions of the witness?

Mr. KOVNER. I have one more question.

By Mr. KOVNER:

Q. Mr. Grange, do you have the information in the Department of Agriculture which shows the varieties of potatoes harvested in Florida, marketed from Florida, from the 1948–1949 potato crop?

A. Yes, sir.

Q. What are the varieties of potatoes that are harvested in Florida?

A. There are two principal varieties. In South Florida, the principal variety in 1949—this is the 1949 crop we are speaking of—when these potatoes would have been planted—the principal variety was Bliss Triumph, and in North Florida, the Hastings

section, the principal variety was called the Sebago. There were Maine, or quantities of Pontiacs grown in South Florida at that time, and since they have been becoming increasingly important, those are the three major varieties in Florida.

Q. Is the Katahdin produced in Florida?

A. The Katahdin potato is extremely unimportant so far as Florida is concerned. Negligible quantities of Canadian potatoes are planted.

Q. Is the cobbler potato harvested in Florida?

[82]

A. The same statement may be made about cobblers with equal correctness.

Q. And the certified Mountain?

A. The seed potato. The certified Green Mountain is always which that refers to. I don't know of any of those being grown in Florida. They might be grown in extremely limited quantities.

Q. I show you a copy of Government's Exhibit 1, the invoice from Willis to Capps. Will you tell us what varieties of potatoes were sold?

A. The principal variety was Katahdins, 27,608 hundredweight.

The COURT. I did not hear that question.

Mr. KOVNER. If Your Honor please, the invoice from Willis to Capps, Incorporated, covering the sale of these 48,450 100 pounds of potatoes, shows the varieties of the potatoes that were sold.

The COURT. From Willis to Capps?

Mr. KOVNER. From Willis to Capps.

The COURT. Is that what he is going to answer?

Mr. KOVNER. That is what he is reading from. It shows the varieties sold.

The WITNESS. 27,608 hundredweight were the Katahdin variety which I just said was negligible so far as planting in Florida is concerned.

[83]

By Mr. KOVNER:

Q. Go ahead.

A. The next one, the Sebago, 10,500 hundredweight, which is one of the three important varieties. The third one, cobblers, 9,855 and the fourth one was Mountains, 500 hundredweight. So that if this list, Mr. Kovner, there is one Sebago, 10,581 hundredweight that makes up about one-fifth of the lot that you would normally expect to be planted in Florida.

Mr. KOVNER. Before this witness leaves, if Your Honor pleases, I have three documents, the authenticity of which has been agreed to, which I should like to put in evidence.

The first——

Mr. ASHBURN. They are all set forth in the request for admissions. They were admitted in the reply, if you want to read them from that, or you can put them in separately.

The COURT. What are they?

Mr. ASHBURN. Telegrams.

Mr. KOVNER. Telegrams between Guy W. Capps and the Department of Agriculture official, on January 11, 1949.

The COURT. All right. Suppose you read them.

Mr. KOVNER. The first telegram is dated January 10, 1949, and it is addressed to Guy W. Capp, 1210 East Water Street, Norfolk, Virginia. It is from A.

[84]

E. Mercker, Acting Chief, Potato Division, Fruit and Vegetable Branch of the Department of Agriculture.

Have been informed ACCO representative, Jacksonville, Florida, claiming you have special permission from Department to sell Canadian seed for edible use, if no demand for seed. Please advise basis for claim. Account such disposition is contrary to the intent of

U. S. Canadian agreement and to Canadian requirement regarding diversion or reconsignment."

Signed, A. E. MERCKER,
Acting Chief, Potato Division,
Fruit and Vegetable Branch.

If Your Honor please, it is stipulated that ACCO in this telegram refers to the Atlantic Commission Company.

The next telegram——

Mr. ASHBURN. It is not stipulated that anybody from ACCO ever told any agent of the Department of Agriculture that though it is stipulated that the telegram was received by the Capps Company from Mercker, and answered.

The COURT. What does it say about ACCO?

Mr. KOVNER. It just says that the Department of Agriculture official tells Capps that here he is going to sell this Canadian seed for——

The COURT. Does not say he told him?

Mr. KOVNER. No, sir.

Mr. ASHBURN. It does say.

[85]

Mr. KOVNER. Informed ACCO representative, Jacksonville.

I am not offering to prove what the ACCO representatives say. I am merely offering it.

The COURT. What does it say that they were informed by ACCO?

Mr. KOVNER (reading):

"Have been informed ACCO representative, Jacksonville, Florida, claiming you have special permission from Department to sell Canadian seed for edible use, if no demand for seed."

Mr. ASHBURN. If no demand for seed. All right. Now the answer.

Mr. KOVNER. That is U. S. Exhibit 8.

The COURT. Let it be admitted.

(Said telegram, so identified, was marked and received in evidence as "Government's Exhibit No. 8.")

Mr. KOVNER. The next is a telegram dated January 11, Norfolk, Virginia, January 11, 1949, 3:37 p., which I take it refers to p. m.—A. E. Mercker, Acting Chief, Potato Division, Fruit and Vegetable Branch, United States Department of Agriculture, retel:

"Have not made such statement. Only put seed Jacksonville for seed purposes.

"GUY W. CAPPS."

[86]

The COURT. Only put what?

Mr. KOVNER. Only put seed Jacksonville for seed purposes.

The COURT. What does that mean?

Mr. KOVNER. Rather a cryptic statement that the seed loaded on the S. S. *Empire Gangway* for Jacksonville, Florida, was for planting in Florida and Georgia.

Mr. ASHBURN. It is a reply to the former telegram. The two read together.

The COURT. I know it is, but you read it that way. It doesn't explain what he means by that contraction unless he is referring to the statement or stamp that is on the shipment.

Mr. ASHBURN. No, Your Honor. If I may take the two papers in my hands a minute.

Mercker apparently sends a telegram to Capps, in which Mercker says that he has been informed that Capps is said to have had permission to sell Canadian seed for edible use if there is no demand for seed potatoes at Jacksonville. He asks Capps to advise the basis for the claim that he has permission to sell them for edible use if there is any such. Capps replies that

he has not made any such statement, that he has such permission that he put seed potatoes at Jacksonville for seed purposes.

The COURT. For what?

Mr. ASHBURN. For seed purposes, and there is still

[87]

a third telegram which is a part of the same exchange of communication.

The CLERK. No. 9.

Mr. KOVNER. No. 9.

No. 10 is to A. E. Mercker, Acting Chief, Potato Division, Fruit and Vegetable Branch of the United States Department of Agriculture, dated from Norfolk, Virginia, January 11th, from Guy W. Capps, further retel:

"I realize fully the agreement with Canada, its intent and want to and expect to cooperate with the program. I am only bringing in seed for seed purposes. Canadian dealers are now quoting seed same territory I am selling. Have had quotations as low as 365 hundredweight delivered Norfolk, past week."

Signed, "GUY W. CAPPS."

If Your Honor please, we offer these to show that the defendant had notice of the Executive Agreement to meet the allegations in the complaint that the defendant did not know of the Executive Agreement at the time that it gave the assurance.

(Said telegrams, so identified, were marked and received in evidence as "Government's Exhibits 9 and 10.")

The COURT. Allegation in the answer.

Mr. KOVNER. I beg your pardon.

The COURT. Are there any further questions?

Mr. KOVNER. No, sir.

[88]

Cross-examination by Mr. ASHBURN:

Q. Mr. Grange, I would like to understand the price support program of the Department of Agriculture, and I would like you to correct me if my conception of it is erroneous.

A. Yes, sir.

Q. As I understand the beginning in 1947, and I take that year from your statement, the Department of Agriculture made an offer to the growers of potatoes in the United States that so many of those growers as chose to enter into contracts with the Department of Agriculture in which contracts the grower would agree on his part not to plant but a certain number of acres. The Department of Agriculture would agree on its part in the contract that it would buy the potatoes which he grew and harvested at the figure and money stated in the contract per 100 pounds. Is that the substance of it?

A. That is not quite correct, Mr. Ashburn.

The statement itself perhaps is correct, but it leaves—do you want me to clarify it?

Q. Yes, sir; if you please.

A. The price support program for potatoes started in 1943, not 1947.

Q. I took that from your reference.

A. I was referring to the acreage allotments to the individual farms that started in 1947.

[89]

Throughout the war period the surplus did not become extremely burdensome. After the war it did. The requirement diminished very greatly. We needed about an extra 75,000,000 bushels to feed lend-lease, Army, and what have you.

It was in 1947, Mr. Ashburn, therefore, that the acreage allotments were adopted. They were figured

out on the basis of what they had been doing and everybody was scaled down, if they didn't, from what they had been doing, then we would enter into this contract with them to take the surplus off their hands at a stipulated price.

Does that help?

Q. You agreed to take the whole crop at that price if they chose to deliver it to you?

A. No, sir. Part of the contract was that they had to make every effort to sell their potatoes in the commercial market. That was part of the contract that you are refering to, sir.

Q. At a price as good as the figure stipulated in the contract?

A. It was not expected they would sell it under what we would pay; that is correct.

Q. Did you have any objection to their selling at a figure under what you would pay?

A. No, sir. There was no obligation for them to do it.

[90]

Q. So, as the result of the contract, the Department of Agriculture was obligated to take only the quantity which the farmer did not sell in commercial channels?

A. Yes, sir.

Q. That is correct, is it?

Q. That's basically.

Q. Do I understand that on such a program it was optional with the farmer whether he choose to become a party to the arrangement or not?

A. That is true.

Q. There was no compulsion about it? He did not have to do it?

A. No, sir.

Q. You had no obligation to buy his potatoes unless he signed up as a part of the program?

A. That's right.

Q. I understand you to say that, and I am speaking now in terms of the year 1948, that about 80 percent signed up and 20 percent did not sign up.

A. Yes, sir.

Q. When you speak in terms of percentage, do you mean 80 percent of the individuals who were growing potatoes, or do you mean 80 percent of the total number of bags of potatoes produced and harvested in the United States in that year?

A. Actually I was speaking of neither one. I am

[91]

speaking of the acreage, Mr. Ashburn.

Q. How could you know, Mr. Grange, concerning what the acreage was when you had no count on the acreage except as to who did sign up?

A. No, sir. That's not true. We measured, or attempted to measure, every farm that grew potatoes in this country in excess of three acres per farm.

Q. You mean you measured all the acreage the farmer had?

A. Yes, sir.

Q. And if he had a hundred acre farm and the preceding year had grown 10 acres of potatoes, what did you measure? The 10 acres or the 100 acres?

A. We measured the acreage in potatoes. We were not interested in the size of the farm.

Q. So if he grew 10 acres in 1947 and did not sign up, he still could grow 100 acres of potatoes in 1949?

A. That is correct, sir, but we measured the—to answer your earlier question—we measured that acreage so we knew—you asked how we knew—we knew what percentage was in compliance as we called it, because we measured all.

Q. You said you measured in 1947 and you measured in 1949.

A. That is right.

Q. And when you measured in 1947, you measured the number of acres that he planted in potatoes in that year?

[92]

A. That's correct.

Q. And if you didn't sign up, you had no count at all on how much acreage when he planted in potatoes in 1948 because he did not measure that year?

A. That is the one exception, the 1948 year. Yes.

Q. All right, sir.

Now then, at the beginning of the 1948 crop year, the Department of Agriculture was committed to purchase how many million bushels of American grown potatoes?

A. We had no advance commitment as to the specific number of bushels Mr. Ashburn.

Q. Well, you had as to the certain numbers of acres.

A. That's correct.

Q. What was the number of acres?

A. The acreage planted in compliance with their allotments, if I may refresh my memory.

Q. Take your time.

A. You are asking about 1949?

Q. I am asking about 1948.

A. I didn't bring that with me because these potatoes we are talking about were being planted, would be planted for '48, so I was confining my notes to the '49 situation.

Q. The potatoes planted in 1948 would be the potatoes that went to market in January, 1949, for table use, wouldn't it?

[93]

A. That's correct, sir.

Q. What I am interested in, then, is what your commitments were to buy for the acreage planted in 1948?

A. I can give you an approximation.

Q. If that is the best you can do, I will take the approximation.

A. If I can have a few minutes, I can do better than that, but right here, I have to limit myself to an approximation.

It would be, Mr. Ashburn, approximately 950,000 acres.

Q. Well now, translate that. Of course I realize that this will not be exact, but within reasonable limits in realization and number of bags of potatoes grown and harvested?

A. Number of bags, 100-pound bags?

Q. 100-pound bags from 950,000 acres.

A. It would be approximately 150,000,000.

Q. 150,000,000 bags you had a commitment to buy, the Department of Agriculture did?

A. As it makes commitments, yes, sir.

Q. How many bags did it actually buy in fulfillment of that commitment?

A. We bought—it's in one of those exhibits there, Mr. Ashburn. We bought in the '48 crop 81,068,000 hundredweight.

[94]

Q. 81,068,000 hundredweight?

A. Yes, sir; bags.

* * * * *

[96]

Q. Did not your commitments not encompass as well American grown seed potatoes as American grown table stock potatoes?

A. Not as such, Mr. Ashburn.

Q. Well, let us put it this way, and see if we understand one another.

[97]

When you contracted with a farmer that you would take his crop at the support price, you would take his whole crop whether 50 percent of it could be certified and was usable as American grown certified seed, and 50 percent usable for table stock, whether it was all of such condition and quality that it could be certified for seed, or whether none of it was of such condition and quality that it could be certified for seed?

A. I don't believe I followed you, Mr. Ashburn.

Q. I want you to follow me. I want to make it plain.

The Department of Agriculture is contracting with Mr. Jones, who is a farmer in Maryland, planting 40 acres of potatoes and it agrees to take his crop when harvested at a support price stated in the contract, if he doesn't sell it into commercial channels. Does not that agreement cover the crop even if the whole crop be of as good quality as American grown certified seed potatoes?

A. I understand the question now. May I answer it this way, sir?

Q. Any way that is accurate, sir.

A. I will try to be accurate.

This agreement, this contract that we had with these growers where they signed a contract—I have a copy of it here, if you are interested—specified that we would take U. S. No. 2 grade, or better, potatoes from

[98]

them. Those are the marketable potatoes. Now if this Mr. Jones of yours in Maryland grew some certified seed potatoes and they would net U. S. No. 2

grade, which they undoubtedly would, he could deliver those potatoes to the Government simply as No. 2 grade potatoes. In all probability there would be in certified seed tag on them, or anything that would identify them as certified seed——

Q. Because he would not have asked to have them inspected to become eligible?

A. There would be no reason for him to go through the expense of putting a certified seed tag on them.

Q. Correct. And of course they would have to be of quality equal or better than No. 2 grade in order to become on inspection salable as seed potatoes?

A. That is right. We are inspected under it as Federal State Inspection Service. Every potato that was delivered and sold to the Government, and they had to meet these minimum quality standards.

Q. Mr. Grange, you speak of a production of 48,000,000 in 1948 of American grown potatoes that were of a quality sufficiently good to be used for seed.

A. Well, not quite that, Mr. Ashburn. There were 48,000,000 of certified seed potatoes grown.

Q. That is to say out of the total crop 48,000,000 bushels were either certified as seed or were of quality?

[99]

A. No. They were certified as seed.

Q. And you say the demand for those potatoes did not exceed 30,000,000 bushels?

A. That's the Department of Agriculture's estimate as to the volume of potatoes that were planted from that crop.

Q. Well then, is it a natural assumption that as to all those in ownership of farmers who had contracted with the Department of Agriculture, the Department bought the excess which they could not sell for seed?

A. Yes. Those eligible farmers. It would be a natural assumption, I believe.

Q. I see. Well now, Mr. Grange, I understand the hypothesis of the Government to be that if the 48,544 100-pound bags of potatoes which came into Jacksonville in the S. S. *Empire Gangway* were eaten, rather than planted, that they displaced an equivalent quantity of American grown potatoes in the public market? That is the theory, as I understand it, and the Government says, therefore, the Government at some undetermined time and place must have bought 48,544 bags than it would otherwise have bought?

A. Yes, sir.

Q. Isn't this also true, if those 48,544 bags were every one planted, did they not displace an equal quantity of American grown seed potatoes?

A. Yes, sir.

[100]

Q. And did not the Government thereby and by reason of that fact buy the identical quantity of American grown seed potatoes which was not used for planting?

A. That was part of the basic agreement, Mr. Ashburn.

Q. Well then, tell us how the Government has lost a single cent, whatever was the utilization of all or any part of those potatoes.

A. I think it is quite evident, Mr. Ashburn.

Q. It isn't evident to me.

A. Well, I will do my best to try and explain.

The quantity of certified seed potatoes brought in from Canada that was used as table stock did represent an addition to the quantity of potatoes available in this country. Now in working out this agreement, historically we have been getting a certain quantity

of certified seed potatoes from Canada. Most of the certified seed is grown in this country, but there has been a small amount come in from Canada. This was a bilateral agreement. It wasn't onesided. We agreed to let them maintain and keep their normal certified seed market even though, technically, as you say, if they hadn't been able to get it, they would have been forced to buy some certified seed in the U. S. A. and we would have been that much better off. Yes, if one man were making the decision, I think it might have been written that way without regard to our relationship with Canada, and also with regard

[101]

to the interest of the growers in this section, and language, the Atlantic Seaboard that have used, but we said you can maintain that volume of business as long as it stays within the time limits. It's going to be used for seed. We won't tamper with that. We'll let you count that legitimate business. Don't bring in any more than you need for this legitimate seed business.

Now that, Mr. Ashburn, is as clearly as I can express it, as the distinction between using it for certified seed on the one hand, and diverting it or using it for table stock on the other.

Does that help?

Q. But, Mr. Grange, that begs the question, depending upon the use of the potatoes, if they displaced anything at all, they displaced either American grown potatoes which would otherwise have gone for table stock, or American grown potatoes which would otherwise have gone for seed, and the Government's position is identical in both aspects of it. The Government's obligation is to purchase as of the same quality and presumably did purchase of the same

quantity. Whatever these potatoes displaced, if they ever displaced anything.

Now how can you answer that otherwise? It is a self apparent mathematical fact, isn't it?

A. Are you asking me, sir?

Q. Yes, sir.

[102]

A. Well, as I say, I think there is quite a distinction between certified seed and table stock use.

Q. Mr. Grange——

A. And within the realm of the legitimate certified seed requirement, it was recognized and decided that that would be permitted, but not to stay within that—not to bring in more than was required for that. Now I think mathematically, Mr. Ashburn, as you have shown very clearly, I think, you can draw that same comparison between certified seed and table stock. I am not saying that there wasn't displacement. I couldn't honorably say that there wasn't displacement of certified seed. I am not trying to. I am just trying to explain my understanding of it, but the objective was to permit the continuance of what was considered to be normal customary practices which were in certified seed.

Q. May I interrupt you for just a moment?

A. Yes, sir.

Q. This quantity of potatoes was a part of the continuance of the normal practice as evidenced by the fact that it came within the minimum bracket and the tariff on this shipment, as it was checked, was only 37½, if it came in the second group; it would have been 75 cents for seed potatoes?

A. No, sir. I believe the tariff on this was 75 cents.

Q. I don't think so, but I will check it. I think it was 37½.

[103]

A. No, sir. I think you will find the certified seed quota was filled that year approximately December 5.

Q. December 5?

A. Yes, sir.

Q. Well, if the 37½ cent quota was filled before these potatoes left Canada, they were still within the normal and allowable quantity shipped?

A. I have no basis for answering that, Mr. Ashburn. I don't know what you are assuming.

Q. Mr. Grange, let's go into this for a moment.

Of course the United States could have, by its own action and without any agreement with Canada, prohibited the importation of any potatoes, including seed potatoes, entirely, couldn't it?

A. There are public laws that give the President authority to take such action as that.

Q. Yes, sir.

A. Yes, sir.

Q. That could have been done?

A. Yes, sir.

Q. But the United States chose not to do that and the Department of Agriculture chose to allow a continuance of the existing practice with respect to the importation of seed potatoes, Canadian seed potatoes?

[104]

A. Yes, sir.

Q. Mr. Grange, wasn't that motivated partially by the willingness to give the Canadian grower a market for his potatoes, and partially by the fact that in South Carolina, Georgia and Florida, and Alabama, the American farmer wouldn't buy an American seed potato if he could get a Canadian potato?

A. No, sir.

Q. Do you assert that there is any considerable demand for American grown seed potatoes in South Carolina, Georgia, Florida and Alabama?

A. Yes, sir.

Q. You do? Do you have any statistics on it?

A. Yes, sir.

Q. Well, what do the statistics show as to the farmers' preferences?

A. I have this:

Mr. Ashburn, in the way of statistics I have gotten for the last several years from the Bureau of Plant Quarantine of the demand. I don't know of Canada, today, a record of their exports of certified seed by States of destination in this country. We also have the U. S. Department of Agriculture figures as to the total amount of potatoes planted in each State and, sir, if you will compare the exports of the Canadian potatoes to these different States with their total seed requirement, you will see that there was a very large gap between them. So all I can do is assume that it

[105]

must have been filled by U. S. seed potatoes, because there is no other source of seed potatoes in this country.

Q. Did you ever try selling any seeds to farmers in those States yourself?

A. No, sir.

Q. You have inquired of them as to their preference?

A. Yes, sir.

Q. How many?

A. Oh, that's hard to answer. I have met and talked with a good many people in the potato industry in the last several years. I couldn't give you an answer as to the number. It's rather a large number.

Q. You don't know whether it is truly representative or not?

A. No, sir; I made no attempt.

Q. Mr. Grange, how many potatoes were produced in the 1948 crop season in the United States outside of the export program which the growers had no Government subsidy, no contract and no guarantee?

A. If I may come up with an assumed figure like we did on the other.

Q. Well, do you not have a reasonably accurate figure from marketing?

A. No. You see, as I told you, Mr. Ashburn, we made our determinations of who was in the program

[106]

on the basis of acreage. We had to determine that before the man started to dig, like here in Virginia. We cannot wait until after he was dug. We have to measure his acreage. So we didn't have a record as to what the total production was that was under the program. I know how many acres were planted above their allotments, see? Now I can take that and multiply it by the same yield that I was using here in making this statement of 150,000,000 hundredweight of eligible potatoes that I gave you, if that would be satisfactory.

Q. But you could not give me a figure which included the growings of a farmer who had no allotment?

A. Yes, sir. This estimate that I have is the total amount of potatoes that were grown above their allotments, whether their allotment was zero or 10. It's above their allotment.

Q. You don't actually know how many went to market in that year, though?

A. No; no.

Q. Is it not the fact that in 1948 growers in Pennsylvania, New Jersey, New York, would not join the price support program to a far higher percentage than in some of the other States?

A. Pennsylvania, Mr. Ashburn, your statement would be correct. I don't think I would intend it to New York and—what did you say?

[107]

Q. I said Long Island, which is the potato-growing section in New York, and New Jersey.

A. No. It would not hold true for New Jersey and neither for Long Island. It would for Pennsylvania, sir.

Q. Mr. Grange, you talked about 50 railroad cars of potatoes going into Jacksonville in January 1949.

A. Yes, sir.

Q. The railroad cars were the only means of transportation on which the Department of Agriculture had any check, were they not?

A. In Jacksonville, yes, Mr. Ashburn.

Q. All of the potatoes from Pennsylvania, New Jersey, New York, that went into Jacksonville in 1949 moved by truck, didn't they, on the straight end out north-south long haul?

A. I don't know, sir.

Q. 58 railroad cars would not take up the normal demand for table stock in that area in that month by any means, would they?

A. I, Mr. Ashburn, don't know what the truck lot unloads were in Jacksonville. It's logical to assume that certain potatoes were coming in there by truck. There would be less in January than there would be in other months, other times of the year, because they would be traveling a greater distance, but as to the volume by truck, Jacksonville is not one of the cities where we maintain truck unload records.

[108]

Q. So the Department of Agriculture knows nothing whatever about the volume of potatoes that moved by motor vehicle transportation?

A. In Jacksonville, sir?

Q. Well, does it know generally?

A. Well, if we were talking about New York City, I could give you the truck unloads by New York City, by States of origin, the same as I could rail. We have that information for a number of cities. We do not have it for Jacksonville. So it is not correct to say that we don't know something about truck movements. We also know the movement by truck, for example, potatoes and other produce out of the State of Florida. I could give you those figures, but I can't give you truck unloads for the City of Jacksonville.

Q. Pardon me just one second, while I look through this for something.

In the month of January 1949, according to the testimony taken on behalf of the Government, the Atlantic Commission Company alone in its Southern Division, handled 380 carloads of potatoes, didn't it, and you only speak of 58 cars going into Jacksonville. Do you know that? Did you check those figures?

A. I wasn't engaged in that testimony, sir.

Mr. KOVNER. Those were the figures that Mr. Ashburn included from the testimony on the depositions.

[109]

Mr. ASHBURN. I asked him if he checked them.

Mr. KOVNER. Not in evidence.

Mr. ASHBURN. I thought perhaps he checked them. I think I will withdraw my objection and let them go in.

By Mr. ASHBURN:

Q. Did I understand you to say, Mr. Grange, that you would not assert that the Department of Agriculture had bought a single bag more of potatoes by this transaction than if the transaction had not occurred?

A. No, sir.

Q. Where did you say you bought them, and when, and at what price?

A. I think it most logical assumption to where and when.

Q. But we cannot deal with assumptions. I would like to deal with facts.

Mr. KOVNER. If Your Honor please, I think the question as to what the measure of damages may be and how you compute that is a question of law that the witness on the stand may or may not be able to answer. Mr. Capps may inquire of him as to what facts he thinks are relevant.

The COURT. The question is what was actually bought, isn't it?

Mr. ASHBURN. That is it; when.

Mr. KOVNER. What potatoes were actually bought? Well, was it the quantity of potatoes that were actualiy——

[110]

Mr. ASHBURN. No; I want to know when and where you say the Government caused—your contention is 48,544 bags that it would not otherwise have bought.

Mr. KOVNER. When and where?

Mr. ASHBURN. When and where and from whom?

Mr. KOVNER. The Government is not making any attempts to show specifically out of this potato price support program exactly when and where it would have purchased these potatoes.

The COURT. You contend that the over-all figure was increased by that amount?

Mr. KOVNER. That is correct, Your Honor. We have suggested a proposition that will help give us a statement as to what was a reasonable estimate by——

The COURT. Let's see if the witness can answer the question.

The WITNESS. Yes, sir. Well, I can't say except what, in my opinion, would be, sir, if you would——

By Mr. ASHBURN:

Q. I don't want your opinion. I want your facts.

A. If you would like my opinion, I would be glad to give you that.

Mr. ASHBURN. I don't think the witness is entitled to state some theory. I think that is the basis for his damages. He must predicate it on something

[111]

tangible that at least will serve according to the concepts of the law as to the manner of proof of damages.

The COURT. I do not think he has to show that this particular shipment of potatoes was the additional amount that was purchased.

Mr. ASHBURN. Well, Your Honor——

The COURT. He can show that any, that the excess was caused by this shipment, if he can.

Mr. ASHBURN. If he can, Your Honor, but can he? He has not.

The COURT. That is a difference of opinion between you and Mr. Kovner, I guess.

Mr. ASHBURN. I would expect so, Your Honor, but I am trying to find something I can reach out and grasp, I can put my hand on.

The COURT. Suppose you tell us, then, Mr. Grange, How do you arrive at the conclusion that the Government is required to purchase 48,544 bags of potatoes?

The WITNESS. Well, Your Honor, we were purchasing in January 1949, in 20 or 25 States. I have the figures as to the total quantity that we bought in each State during that month. We were buying only to the extent that the available supply of potatoes exceeded the market requirement. Now it is, I believe true, that regardless of where those potatoes came from, whether they were ineligible potatoes grown in

[112]

this country or ineligible potatoes grown in Canada as to the extent that you increase that available supply—you buy the stamp tag, even increased the Government surplus purchases—to answer your question as specifically as I can, Mr. Ashburn, I would say that our purchases because of this shipload were in and among those 20 or 25 States where we were buying surplus late-crop storage Irish potatoes that are comparable and almost identical with the 48,544 bags that were unloaded in Jacksonville.

By Mr. ASHBURN:

Q. Let's go into that in a little more detail from your records. Pick out one farmer in some State whose potatoes you bought in 1949, pick out one, just one. Anybody, anywhere you want to.

A. I do not have the individual farm records with me, sir.

Q. Then we will have to theorize. We will take an illustrative case, not involving real characters. Let us say that you bought 500 bags of potatoes from John Jones in Aroostook County, Maine, in January 1949, under the support program, and you paid him the Maine support price and we will say that $3.10.

A. $3.15.

Q. Your theory is that you had to buy those 500 sacks from Mr. Jones in Maine because he is deprived

[113]

of the ability to sell the 500 sacks in Florida, since the company imported 48,000 sacks of Prince Edward Island potatoes in Florida in January 1949. That is your theory, isn't it?

A. Yes, sir.

Q. No. 1, do you know whether this Mr. Jones ever made any effort to sell his 500 sacks of potatoes?

A. That was one of the provisions of the contract that we had with Mr. Jones.

Q. Did you check with him?

A. Certainly, we made every effort to minimize our purchases to the greatest extent possible.

Q. Well——

A. To keep them.

Q. What check did you make with Mr. Jones to see if he tried to sell it?

A. There were many times. If you are using specific illustrations of the Maine, in the period of '48, there were many times when our offers greatly exceeded the quantity that we were purchasing at that time. We didn't want to increase it any more than we possibly had to.

Now as to checking with individual farmers, Mr. Ashburn, that was operated by the States and county officers. They had a certain check and follow-up to what the surplus was, how it was moving along, that sort of thing, that I personally was not engaged in.

[114]

I know generally what was going on but I can't give you a specific illustration.

Q. Mr. Grange, you also know that the individual potato grower dosn't ever attempt to sell his potatoes in a distant market, does he? He sells them to the produce buyer where his farm is, in that locality, doesn't he, as a matter of custom.

A. Yes, sir. Except in many instances the farmer is also a country shipper, as you know, sir.

Q. So that it is purely theoretical and speculative whether anybody would have wanted to buy Mr. Jones' potatoes and send them to Florida, in January 1949?

A. Based on rail alone of course they did buy 15 carloads of Maine potatoes and sent them to Jacksonville, in '49. The total Florida shipment would be considerably greater than that.

Q. Fifteen cars of Maine potatoes were at freight rate, as you said, of $1.37 a hundred pounds. That meant that those potatoes had to sell in Florida to get more than your support price for $4.47 a hundred; in Florida, didn't it?

A. $4.52, sir.

Q. Four fifty-two? So that if anybody in the business wanted to buy table stock potatoes anywhere available, he would have bought them anywhere from Florida?

A. The support price in Pennsylvania and New Jersey, for example, is higher than it was in Maine,

so that is taking into account in setting these price supports for the various States, so I question if the delivered price in Jacksonville is as satisfactory as New Jersey potatoes would be, any less than the Maine potatoes.

Q. Well, you mentioned a certain number of cars of Idaho potatoes. They have no special significance because that is a selective cooking potato for baking purposes only isn't it; customarily used?

A. Well, not entirely, Mr. Ashburn, but it is widely known and widely advertised as being a baking potato.

Q. That is a customer selection potato; he specifies what he wants to buy?

A. That is. I would agree with you here in this particular locality that we are speaking of. If we were talking about a Western State or something, it would not be true, sir.

Q. Of course, Mr. Grange, the kind of a potato that a farmer plants is a matter of his selection and preference?

A. Yes, sir.

Q. And like most things of that nature, that is not a unanimity of opinion about what is desirable.

A. Yes, sir.

Q. People hold different views?

A. Particularly farmers, Mr. Ashburn.

Q. Well now, let us go back for a moment to this

[116]

particular cargo of potatoes. You do not actually know, nor does any other human being know, what portion of this quantity was used up, exhausted by eating, and what portion of it was used up and exhausted by planting, is that not the fact?

A. I am not prepared to testify on that point, Mr. Ashburn. I was not even engaged in the investigation as to the disposition of this shipload

Q. Well, suppose 48,000 bags were planted, and 544 bags were eaten. Would it be your position then that the only additional quantity the Government had to buy in consequence of which it suffered damage, was the 544 bags?

A. My position would be, our only claim would be on the 544 bags.

Q. It is true, then, that your claim depends as to a monetary amount, bag for bag, on what was used up by eating and what was used up by planting, corresponding to your theory of your claim?

Mr. KOVNER. If Your Honor please, I think that is a question of theory, not a claim of damages. I think

Mr. Grange can answer any facts, but I think the legal theories should be left to the lawyers.

The COURT. I think he can answer not only from an evidence standpoint but from his own ability. I believe it is admissible.

Mr. KOVNER. Well, I did want to suggest that that legal theory in this case is something lawyers work out rather than economists.

The COURT. Then he has asked this question to reply to that theory specifically.

Mr. KOVNER. It is not our theory that we have to show it bag for bag.

The COURT. It is not your theory?

Mr. ASHBURN. That was mine, Judge. I have no hesitancy in saying.

By Mr. ASHBURN:

Q. Do you agree with that, Mr. Grange?

A. Would you restate it, Mr. Ashburn?

Q. I think you have answered for me, but I wanted it to be perfectly plain. You said in that event you would have a claim on it classed upon 544 bags, which means there is a direct relationship between your claim and the quantities used up by eating and the quantity used up by planting.

A. I don't think I said claim, Mr. Ashburn. If I did, I meant to say that so far as the replacement of potatoes in this country goes, it would be that portion of it that was contrary to our intent. I am thinking back now, and I am not a lawyer, so I can't answer all these, but I am thinking back now to the basic beginning of this agreement, Mr. Ashburn, what our intentions were and what we are trying to accomplish by it. What we are trying to do is keep out all the

[118]

Canadian potatoes we could. We did keep out table stock, and then we put restrictions around the certified seed so that, to the extent that they were not used for certified seed. It was contrary to our purpose and our whole objective in getting into this agreement with Canada.

The COURT. That is the entire extent of your injury, that is for each potato that came in on the *Gangway* and was used for table purposes? Your view is that the Government suffered to that extent and only to that extent?

The WITNESS. I agree with that, Your Honor; yes, sir.

By Mr. ASHBURN:

Q. I want to put my hand on a draft of this agreement for a moment, Mr. Grange. You say that the efforts of the Department of Agriculture was to reduce the amount of potatoes that would come into this country from Canada. You have also said that it could have cut them off entirely, or limited them to 10,000 bags, or any given quantity. That is true, isn't it?

A. Yes, sir.

Q. Well now, is this not the language of the letter from the Canadian Ambassador, which, as I understand it, the Government's contention expresses a part of the agreement between the parties—I will read the preamble in order that it may be understandable.

[119]

He addresses apparently the American Secretary of State, and it is dated November 23, 1948.

SIR: I have the honor to refer to the discussions which have taken place between the representative of the Government of Canada and the Government of the

United States of America regarding the problems which would confront the Government of the United States as in the operation of its price support and other programs for the potatoes. If the imports of Canadian potatoes during this current crop year were to continue to be unrestricted, after careful consideration of the various representations which have been made to the Canadian Government on this subject, the Canadian Government is prepared to—

"1. Include Irish potatoes in the list of commodities for which an export permit is required under the provision of the export and import permit account.

"2. Withhold permit for the movement of table stock potatoes to the United States precluding Alaska.

"3. Issue export permit for the shipment of Canadian certified seed potatoes to the United States but only under the following circumstances:

"A. Export permit will be issued to Canadian exporters for shipment to specified States in the United

[120]

States and such permit will only be granted within the structure of a specific schedule. The schedule is designed to direct the shipment of Canadian certified seed potatoes into those States where there is a legitimate demand for certified seed potatoes and only during a short period immediately prior to the normal seeding time. A draft of this schedule is now being jointly prepared by Canadian and United States officials."

Now, I pause for a moment before reading 3.

It is evident that Florida and Georgia qualified under the schedule that is referred to for shipment in December, 1949, is it not?

A. Yes, sir.

Q. They qualified.

"B. Export permit will only be granted to Canadian exporters who could give evidence that they had firm orders from legitimate United States users of Canadian seed potatoes. Canadian exporters would also be required to have included in any contract into which they might enter with the United States seed potato importer a clause in which the importer would give assurance that the potatoes would not be diverted or reconsigned for table stock purposes.

"C. The Canadian Government would survey the supply of Canadian certified seed potatoes by class

[121]

and consider the probability of giving preference to the exporter foundation and A classes of certified seeds.

"D. The names and addresses of the consignees entered so the export permit would be compiled periodically and this information would be forwarded to the United States Government."

I skip some explanation which doesn't seem to me important, and I read the following paragraph, which is somewhat below:

"It should be noted that the Canadian proposal to institute export permit control on Canadian potatoes and to inaugurate the price support program contingent upon assurances from the United States Government, (a) that the United States Government will not hereafter impose any quantitive limitation or fees on Canadian potatoes of the 1948 crop exported to the United States under the system of regulating the movement of potatoes from Canada to the United States outlined herein."

Does that mean the United States Government would agree to lift the tariff on the '48 crop?

A. No, sir.

Q. What fees were spoken about?

A. Well, this provision that you are referring to, Mr. Ashburn, where we could have put in a mandatory quota, we also could have increased the tariff

[122]

fees up to a certain amount to give further protection. I think they are the fees that are referred to there.

Q. It says Canada's willingness to enter into whatever the arrangement was is conditioned upon the United States not thereafter imposing any quantitative limitation. I thought you said the object was to reduce the quantities.

A. Yes, sir.

Q. You agreed in this that you would not impose any quantitative limitation if it is an agreement at all, isn't it?

A. That is something entirely different.

Q. Quantitative limitation isn't any different, is it? That is a word of plain intendment.

A. No; but, Mr. Ashburn, in order for us to get this voluntary agreement and handle it on a voluntary basis before they would sign, and say Canada took all this action, they put in the export permit. They required it before they would agree to do all that. We had to commit ourselves in advance that we wouldn't come along two weeks later and under the Tariff Act provision and Section 22 of the Agricultural Adjustment Act put in a mandatory quota that might go further than we had agreed to go. They are voluntarily on a ——

Q. By this you did undertake not to limit the quantity that could come in from Canada beyond the quota then existing?

A. I don't understand you, sir. What quota are you referring to?

[123]

Q. I understood you to say that there was a certain quantitative limit then in effect for tariff purposes.

A. The duty rate commences at a certain point. That is all.

Q. What is meant here when it says the Government of the United States will not hereafter impose any quantitative limitation?

A. Well, Mr. Ashburn, as I attempted to explain, this is a voluntary agreement that was entered into between the two governments. As part of the agreement we agreed not to go further than this and put in some additional quantitative regulation which we legally could have under the laws of the country. That is what that is referring to, sir.

Q. Although you say that your real object was to reduce imports?

A. It most certainly was, Mr. Ashburn.

Q. Yet you agree that you wouldn't reduce them?

A. No, sir. That's not the case, Mr. Ashburn. We are referring only that we will not go further than what we have agreed to in that document you have there.

Q. But you tell me there was no quantitative limit before and this agreement says there shall be none afterward.

A. Except for what is contained in that.

Q. There isn't any quantitative limit contained in this.

[124]

A. But it would have the effect of a quantitative limit, sir. When they say we are going to put table stock under the Export Permit Act and we will not issue any permit on table stock—that certainly is going to be a quota. I can show you the week by

week imports of table stock potatoes, if you would like to see what happened to them after this went into effect. This was quantitative in the same manner the certified seed provisions were designed to be a quantitative limitation because they would only go to those States during their normal planting periods and they would have the price advice so that they would have to use them for planting only.

Q. Mr. Grange, the Capps Company was a legitimate United States user of Canadian seed potatoes within the meaning of the language here used, was it not?

A. At the initiation of the program; yes.

Q. Yes, it was. It had a license from the Department of Agriculture. It could not sell seeds, could it?

A. We have in the Fruit and Vegetable Branch where I work, we have one division called the Perishable Agricultural Commodities Division. It administers the Perishable Agricultural Commodities Act of 1930, I believe, as amended. There you are required to have a license before you can deal in interstate commerce in perishable fruits and vegetables. Now, perishable fruits and vegetables includes both table stock and certified seed potatoes, sir, so it

[123]

wouldn't matter whether you were dealing in certified seeds or not. You would still need a PACA license.

Q. And the Capps Company had such a license?

A. I don't know it personally. I am confident they did.

Q. It continued to have such a license as long as it operated, did it not?

A. I don't know that as my own personal knowledge.

Q. The Department of Agriculture never took any step toward the revocation of that license; is that not also true?

A. You are referring to their PACA license?

Q. Yes, sir.

A. Not to my knowledge, sir, I couldn't offer any qualified testimony.

The COURT. Suppose we take a recess.

(The jury retired to the jury room at 4:35 o'clock p. m.)

(Following a brief recess.)

(The jury returned to the jury box.)

By Mr. ASHBURN:

Q. Mr. Grange, I dislike to be so long with this but it seems necessary. I will try to shorten it as much as I can.

A. Thank you, sir.

Q. In Paragraph B of the note from the Canadian

[126]

Ambassador, letter from the Canadian Ambassador, it says, "Export permit would only be granted to Canadian exporters who could give evidence that they had firm orders from legitimate United States users of Canadian seed potatoes."

I believe you have already said that the Capps Company qualified within that language as a user of Canadian seed potatoes.

A. At the beginning of this program; yes, sir.

Q. And it qualified, not because the company itself planted seed potatoes, but because for a long period of years, it had been importing and selling Canadian seed potatoes?

A. That's right, sir.

Q. Well now, that language represented something that the Canadian exporter must do, between the Canadian Custom House and in this instance the

Canadian exporter was H. B. Willis and Company, in Charlottetown, Prince Edward Island.

A. That is correct, as I understand it; yes, sir.

Q. It did not relate to anything that the Capps Company was required by this language to do?

Mr. KOVNER. If Your Honor please, I object to that question. This agreement speaks for itself as to what it does or does not require.

The COURT. I think it does, Mr. Ashburn. It says in there it is.

Mr. ASHBURN. Well, Your Honor, I thought we

[127]

could be permitted to make it plain, if Your Honor please. If Your Honor has that view, I won't qualify.

The WITNESS. I am acquainted with the actual operation of how that was handled, if there is any question.

The COURT. If it were any different, you would have to be guided by what is in here.

The WITNESS. No, Your Honor, only the mechanics.

By Mr. ASHBURN:

Q. Do you know whether Canada required its exporter to present a contract between the exporter and the purchaser for the potatoes? That is, a written contract?

A. Yes. I am quite well acquainted with how they handled that feature of it, sir.

Q. Was a written contract required?

A. They required on their order a written order for the potatoes and they required a certification on that order as to the designation of the potatoes; only the certification that they would be used for seed purposes, only, or planting purposes only. The language varied a little with the different importers.

Q. But the language of the agreement is, or the language of the note is, would not be diverted or reconsigned for table stock purposes?

A. That is right, sir. I can tell you why those specific words were chosen, if they trouble you any. I

[128]

remember that from our drafting this thing.

Q. These potatoes were shipped from Prince Edward Island to Jacksonville, Florida. They arrived at their destination. They were not diverted, were they?

A. No, sir. Not from their destination.

Q. You have seen the documents evidencing their sale and the Government has introduced them in evidence. Can you point to any document that would show that they were reconsigned for table stock purposes?

A. Their use was, as I understand it, sir, was the subject of the earlier testimony in this case.

Q. You know nothing about it yourself?

A. I was not directly concerned with that, Mr. Ashburn.

Q. So far as you know, every potato in every bag could have been planted in the approximately five million home gardens in the United States?

A. Well, as I stated to your preceding question, Mr. Ashburn, I was not on that one. That was in Florida, in Jacksonville, and Georgia, checking on the utilization of these potatoes.

Q. So you have no knowledge about that?

A. No. Not that would be admissible, I have been told.

Q. Mr. Grange, how long was this agreement, as called in the testimony, in effect?

A. The agreement initially was entered into for the

[129]

1948 crop. However, it was terminated on June 20, 1949, which would be a few days prior to the expiration of the crop year.

Q. When did you say it went into effect?

A. The effective date was December 1, 1948, sir.

Q. There has been some suggestion in another proceeding by the Government that it did not become effective until April 9, 1949, and I want to ask you what you know about that?

The COURT. It appears on the face of the agreement when it is effective.

Mr. ASHBURN. I don't think so.

The COURT. Entered into force November 23, 1948.

Mr. ASHBURN. Yes, Your Honor; but that is a notation put on this printed document, not in the body.

The COURT. But the whole thing is certified.

Mr. KOVNER. Yes, sir; Your Honor, the whole thing is.

By Mr. ASHBURN:

Q. You don't know anything about an effective date of April 9, 1949?

A. I think I know what may be confusing you on that point. I know of an April date that may be the one that you have gotten in with this export requirement.

Q. What does the April date relate to?

A. Part of this agreement, sir. Also carried out

[130]

the provision that the Canadians would institute a price support program of their own. We didn't ask them to do that, but in order to make it more acceptable by their growers up there, they felt that they had to do it. They provided that in this, that they would not make any purchases until after April 1, 1949. If you could not sell those potatoes before

that date and still had them in storage, why then we will come around, inspect them and look at them, and buy them to the extent necessary to support the price at $1.50 per hundred pounds.

Mr. KOVNER. In Canada?

The WITNESS. In Canada. That's right, sir.

Now that is probable, sir, the April 1 date that you are speaking of. That has no reference at all to this support program.

By Mr. ASHBURN:

Q. That is not an integral part of the framework between the United States and Canada?

A. It was included, part of the agreement; yes, sir.

Q. The Government even stipulated in an action pending in New York that the effective date of the agreement was April 9th, didn't it?

Mr. KOVNER. I think that is wholly——

The COURT. I do not think that is relevant here.

Mr. KOVNER. No such stipulation shown so far as I

[131]

know, no such stipulation ever entered into. I don't think that is a fair thing to say. The document speaks for itself.

Mr. ASHBURN. All right, sir.

By Mr. ASHBURN:

Q. You are pretty familiar with this price support program, over the years?

A. Quite familiar with it; yes, sir.

Q. And an expert concerning the marketing of potatoes in general?

A. I have been working on that for a number of years.

Q. Tell us why there were no potatoes available to any purchasers at any price in March, April, May 1952?

Mr. KOVNER. I don't know what the relevancy is of that question.

The COURT. I do not see the relevancy that may have.

Mr. ASHBURN. It may relate to these happenings.

The COURT. Objection sustained.

I would like to know the answer, too, but I don't think it is relevant.

Mr. ASHBURN. My friend here knows it, what the answer is.

All right, Mr. Grange, that is all.

The COURT. Mr. Grange, before you step down let me ask you one question.

[132]

Could not the excess potatoes that you say the Government had to buy have been caused by production from these nonquota producers?

The WITNESS. Well, Your Honor, part of what we had to buy would be strictly table stock, nonquota, or ineligible; producers in the same manner that these imports from Canada would affect it.

The COURT. You cannot tell which caused it more?

The WITNESS. The volume of our purchases, sir, in order to try to clarify it as much as I can—the volume of your purchases was determined almost entirely by the total supply of potatoes. If, for example, I would go down through and give the production figures by years and what we bought by years, you could see that our purchases went up or down, surplus purchases went up or down as the production went up or down. You see? And so these imports contributed to that total supply as in the same manner as production in this country would contribute to it.

The COURT. You would not have any records of the production by the nonquota producers, would you?

The WITNESS. No, sir. As I told Mr. Ashburn, we have records on compliance with our program, but we had to keep it in terms of acreage or number of farmers.

The COURT. That is what I understood from your explanation. I simply wanted to be sure.

[133]

The WITNESS. Yes, sir.

The COURT. Do you have any redirect examination, Mr. Kovner.

Mr. KOVNER. There is one item I realize on prior and cross-examination that it had not been put in evidence, though it should have been, I offer now as United States Exhibit 11 a copy of the invoice from H. B. Willis to Capps showing the freight charges on this shipment that is involved in this case.

Mr. ASHBURN. No objection.

The COURT. Let it be admitted.

Said invoice, so identified, was marked and received in evidence as "Government's Exhibit No 11).

Mr. KOVNER. I said that that was shown at 40 cents a hundred pounds, and I said it was on the invoice that I had already introduced in evidence, but it is not. It is on a separate bill for freight.

The COURT. Do you need this for your examination?

Mr. KOVNER. No, sir; I do not.

Redirect examination by Mr. KOVNER:

Q. Mr. Grange, do you know whether the Canadians required export purchases, withdrew an export permit that it had granted to the defendants in this case?

Mr. ASHBURN. I object, if Your Honor please.

[134]

The COURT. What was the question?

Mr. KOVNER. Whether an export permit which the defendant had from Canada to secure potatoes from Canada was withdrawn by the Canadian Government. I think it is relevant because—Mr. Ashburn on cross examination inquired of Mr. Grange whether or not Mr. Capps' permit to deal in seed potatoes ever had been cancelled.

The COURT. What is your objection to it, Mr. Ashburn?

Mr. ASHBURN. If Your Honor, it would have no relation whatever to this transaction because we were not the exporter of these potatoes. We bought them. We are not the seller. I do not know anything about the circumstances to which he refers but certainly it has nothing to do with the issues that are before the Court here and furthermore, if anyone ever was withdrawn it was at the instance of the Department of Agriculture, which has brought this case against us. I think it is simply prejudicing us without having any place in the case.

The COURT. Do you intend to show the grounds of the withdrawal?

Mr. KOVNER. Yes, sir. We can show the grounds of further withdrawal, that it was related to this case.

The COURT. How are you going to show it?

Mr. KOVNER. Mr. Grange, I think, is familiar with that.

[135]

The COURT. In turn, how would he know?

Mr. KOVNER. I think he knows as a matter of personal knowledge. Put it this way: It was part of his duties to get reports from Canada on the operations of this program and as it took place in Canada, he would get a report from Canada on that

official report. It would be just like any other matter that he would acquire in the discharge of his duties.

The COURT. Objection overruled.

By Mr. KOVNER:

Q. Mr. Grange, do you know whether the Government of Canada took any action with regard to the defendant, Guy W. Capps, Incorporated, as to their status?

A. Yes.

Q. In the potato trade between the United States and Canada?

A. Yes. The Bureau of Trade and Commerce, as I believe it is called that handled this affair——

Mr. ASHBURN. Which affair?

The WITNESS. The issuance of these export permits, sir—rescinded the authority for any exporter in Canada to obtain a permit in the buyer in the United States, was the Guy W. Capps Company, Incorporated, of Virginia, or I believe Guy W. Capps, Incorporated of Florida, or Guy W. Capps, Incorporated, of Maine.

[136]

By Mr. KOVNER:

Q. What was the ground of that action? Do you know, in the course of your official duties?

A. Yes. It was at the request of the Department of Agriculture in attempting to prevent diversion of these potatoes to table stock use. We had the understanding with them that we would approve those buyers in this country to whom the shipments were being made and we had the understanding with them that we could withdraw this approval at any time if we had reasonable grounds to believe that it was being misused, so it was on that basis that the au-

thority for exporting to this corporation was withdrawn.

The COURT. That was done on the same authority on which this suit was brought?

Mr. KOVNER. Not entirely, Your Honor, if you please.

The COURT. General way?

Mr. KOVNER. General way, it related to the Executive Agreement. The suit is for breach of contract and not for the breach of the Executive Agreement. Just for the breach of contract.

The COURT. So that the withdrawal of the permit is no evidence of the violation of this agreement. It is simply a step taken by the United States to furtherance of its assertion that it was a violation.

Mr. KOVNER. That is right, Your Honor.

[137]

The COURT. All right.

By Mr. KOVNER:

Q. Mr. Grange, do you know why the United States did not impose by force of its own law an embargo on Canadian potatoes?

A. Yes, sir. I think I do.

Q. Can you tell us just briefly what the reasons for that were?

Mr. ASHBURN. Are the reasons material, Your Honor?

The COURT. I would not think so, except in your examination you brought out the fact that the Government had not resorted to——

Mr. ASHBURN. That is correct, sir, but I didn't bring out the reasons. I don't think the reasons have anything to do with it. I only wanted to show that it had the power to do so, if it wanted to prevent shipping out.

The COURT. I think the reasons, then, would be rebuttal, if it is rebuttal.

Mr. KOVNER. It is.

By Mr. KOVNER:

Q. Answer the question.

A. The reason why correct action, unilateral action by this country was not taken is because we wished not to do anything to upset completely our trade

[138]

relations with Canada today, particularly as far as fruit and vegetables were concerned. We in the Fruit and Vegetable Branch were in quite a dilemma in trying to work that out because we were concerned with all of them and not just potatoes. Canada is by far our best foreign customer of fruits and vegetables. We normally sell about three times in dollar value, about three times as many fruits and vegetables to Canada as Canada ships down here. The principal reason for that being is that they do not have any oranges, they do not have the winter fruits and vegetables, production that we get in our southern States, so, in recognition of the fact that we had a lot to lose, if we took arbitrary action under a United States law, that would put Canada in a position where it wanted to retaliate, that we probably would have lost more than we gained. That is why we tried to work out by every means possible, and this agreement itself was not easy to come by, to get it on a mutually agreeable basis. That is the reason why we did not follow this legal course that was brought up earlier.

Q. Was there a drop in the exportation of table stock potatoes, that is, potatoes listed as table stock from Canada to the United States after this agreement?

A. Oh, yes, sir. We accomplished our purpose, I would say, for practical purposes, completely so far as table stock was concerned. The official records will show some issuance, some imports of table stock,

[139]

Mr. Kovner, but the reason for that is that many of that was this undeclared amount under the hundred pounds that would be brought down in automobiles or in dining cars, and then also we accepted Alaska and Puerto Rico, because they normally have a certain trade with Canada and they are a part of the official imports into this country. But so far as actual commercial imports into the United States proper, there were virtually none after this agreement. There were none after this agreement went into effect.

Q. Mr. Grange, in dealing with the operations of the potato crop, the Department of Agriculture would know what the totals were of potatoes purchased, sold on the market, would it not?

A. We have official records giving the total volume of commercial sales by States, sir. We also know the total amount that the Government bought of that by subtracting one from the other. You can obtain the amount that moved to market that way. Now, if I might amend my previous answer to your other question—may I, sir?

Q. Yes.

A. I left out one thing, in saying that there were no imports of table stock potatoes. I, of course, have no personal knowledge or official knowledge as to what the volume is, if any, that might have been smuggled in, could come in contravention to both our Tariff Acts and agreements.

Q. There is an underworld to everything. We cannot deal with that here.

[146]

The figures show that the cost of the program to the United States, the potato price support program, varied from year to year with the potato production in the United States, the quantity of potatoes?

A. Yes, sir. One of your exhibits will show that very clearly because it contains the production figures as well as the purchases.

Q. Would that be this document? May I show you this document?

A. One that has already been introduced.

Q. I am not sure that I have introduced it.

A. Yes.

Mr. KOVNER. I would like to offer in evidence a certified copy of an official document of the Department of Agriculture, which, Your Honor, will give all the statistics relating to the program from January 1943 to December 1, 1949. I think it will be helpful.

The COURT. Let us see if counsel has any objection.

Mr. ASHBURN. The objection is only on the ground that it has no relevancy. It is immaterial.

The COURT. Let it be admitted.

(Said document, so identified was marked and received in evidence as "Government's Exhibit No. 12.")

Mr. KOVNER. Marked as United States Exhibit 12,

[141]

bulletin of United States Department of Agriculture, entitled Irish Potato Price Support and Related Operation, January 1, 1943, and December 1, 1949.

By Mr. KOVNER:

Q. Mr. Grange, can you tell us what the benefits were of the agricultural price support program to a potato dealer like the defendant, Capps?

Mr. ASHBURN. If Your Honor please, we object to this. This is simply an attempt by the Government

to get jury appeal by trying to justify its hold-out to the farmers to get votes for the Fair Deal and New Deal, and the Democratic Party. It has nothing to do with the issues in this lawsuit.

Mr. KOVNER. Mr. Ashburn, I am not running for office and, moreover——

Mr. ASHBURN. Your superiors are.

The COURT. I do not think you gentlemen ought to go into this.

Mr. KOVNER. Your Honor, as I recall the opening statement of counsel for the defendant, Mr. Ashburn——

The COURT. No, I was just talking about the remarks you and Mr. Ashburn are making.

Mr. KOVNER. I certainly didn't intend to. I have the highest regard for Mr. Ashburn. May I just explain why I wanted to get this? I thought Mr. Ashburn stated in his official statement to the jury that

[142]

the potato price support program was something which the defendant had no interest, no benefit.

Mr. ASHBURN. I said we were not a party to it and I did. We had no commitments to the United States.

The COURT. I am not ruling on it. All I was ruling on was Mr. Ashburn's statement about political appeal, and so on.

What I want to get at now is, What is your question?

Mr. KOVNER. My question is, Mr. Grange could tell the jury what the benefits of the potato price support program are to potato dealers, like the defendant.

The COURT. I do not think it is material whether it is beneficial or not. It was the law.

Mr. KOVNER. Very well, sir.

Mr. Grange, I have no further questions.

The COURT. Do you have any further examination?

Mr. ASHBURN. No.

(The witness stepped down.)

The COURT. Have you any further evidence, Mr. Kovner?

Mr. KOVNER. Oh, yes, Your Honor, there is.

No, Your Honor, the Treaty shows on its face that it went into operation immediately.

The COURT. The Government rests?

Mr. KOVNER. The Government rests.

[143]

Mr. ASHBURN. Your Honor, I have a motion I should like to make, if the Court will allow it.

The COURT. Let the jury be excused.

(The jury retired to the jury room.)

Mr. ASHBURN. May it please the Court, the motion of the defendant is for a directed verdict in favor of the defendant at the conclusion of the evidence for the Government.

* * * * *

[173]

The COURT. (from the bench):

Gentlemen, the Court is of the opinion that the motion should be granted.

The action here is for breach of contract made between a Canadian exporter and Capps, the American importer, and specifically of a stipulation placed in that contract which the Court has held was for the benefit of the United States.

[174]

The expression constituting that stipulation is that certified seed potatoes loaded on the S. S. *Gangway* are for planting in Florida and Georgia. Now, assuming that the Court is correct in holding that that stipulation is an agreement within the meaning of the Executive Treaty or an assurance, as it is called

in the Executive Treaty, to the effect that the potatoes would not be diverted or reconsigned for table stock purposes—I say assuming that the Court is correct in holding that this provision is an assurance, there is no proof here sufficient to go to the jury that there has been such a diversion or reconsignment, or that there has been a lack of diligence or care on the part of this defendant to see to it that its assurance was carried out.

In the first place, the only diversion or reconsignment was from the defendant to the Atlantic Commission Company. Now that was not a diversion or reconsignment for table stock purposes. Nor does it evidence any want of care on the part of the defendant to see that the assurance was kept, because the evidence shows that this defendant had from year to year sold to Atlantic, potatoes exclusively for seed purposes. The evidence does not justify or would not justify the jury in drawing a conclusion that it was a reckless abandonment by the defendant of its obligation to see to the use of these potatoes because the defendant had the right to rely upon its previous experiences.

[175]

But going further, and assuming that it was incumbent upon the defendant to follow up and see that this reconsignment did not lead to the use of the potatoes for table purposes, we find that the A & P, to whom Atlantic sold, did sell seed potatoes. It is true that it was not its entire trade in potatoes, but it did sell a large amount, described as its secondary function, for seed purposes, and the other sales by Atlantic to wholesalers or to the trade, as it is spoken of, were to firms which used potatoes for seed purposes or disposed of them for seed purposes, so that the sales by the defendant here were equally consistent with

the compliance as with the violation of the assurance.

But, if we go further, and assume that there was a breach by this defendant of the stipulations, then we come to the weakness on the Government's case that there is no casual connection between the defendant's sale and an injury to the United States. It is not proven that the diversion of the potatoes, assuming there was a diversion, was the cause of any damage whatsoever to the United States.

But going still further and assuming that the United States has been damaged by an excess of potatoes coming on the market, it still cannot be attributed to the defendant, because it is not shown to be the direct result of the defendant's action.

[176]

When the Court says it has not been proven, it does not mean that the Government's counsel has overlooked anything, or omitted in any way to bring forward everything he could do, but the circumstances of the sale are facts, and nothing is more stubborn than a fact, and they fail to show any diversion or any reconsignment, affirmative and positive acts, that must be shown in order to show violation of this agreement.

Let the jury come back, Mr. Marshal.

(The jury returned to the jury box.)

The COURT. Gentlemen, your objection is sufficient to carry an exception, anyway.

Mr. KOVNER. Necessary, Your Honor.

The COURT. Do you gentlemen have any preference as to the form in which this is stated?

Mr. ASHBURN. No, Your Honor.

The COURT. Ladies and gentlemen of the jury, while you were out a motion was made to the Court by the defendant for what is known as a directed verdict. That is asking the Court to hold that on the evidence

submitted there would not be grounds for the jury to hold the defendant liable and the Court has granted that motion and has held that the evidence would not be sufficient for the jury to find a verdict for the plaintiff. For that reason the Court is granting the motion, the directed verdict, and will ask you to sign a verdict, "We, the jury, at the direction of the Court, find for the defendant."

[177]

The Court takes full responsibility for the verdict and when that is signed, you will be discharged.

The CLERK. Ladies and gentlemen of the jury, hearken to your verdict.

We the jury, at the direction of the Court, find for the defendant. Signed Margaret P. Lawrence, Forewoman. July 22, 1952.

This is your verdict, and so say you all.

The COURT. Mr. Marshal, let the jury be discharged.

(The jury was discharged.)

* * * * *

Phone 403 *Exhibit 1* L. D. 1420

H. B. WILLIS, INC.

CHARLOTTETOWN, P. E. I., CANADA

Potatoes, Turnips, Fertilizers, Lime

Consumers, packages a specialty

No. 1658.

Lot 834.

Date, Jan. 4/49.

Ex., Souris, P. E. I.

To Jacksonville, Fla.

Car No. *Empire Gangway.*

Broker.

Terms, SD.

Sold to G. W. Capps, Inc., Norfolk, Va.

27,608	100's	#1 Certified Katahdin seed potatoes	$27,608		
10,581	100's	#1 Certified Sebago seed potatoes	10,581		
9,855	100's	#1 Certified Cobbler seed potatoes	9,855		
500	100's	#1 Certified Mountain seed potatoes	500		
			48,544	$1.82	$88,350.08

Exhibit 2

H. B. Willis, Inc.,
Charlottetown, P. E. I., Canada.

Certified seed potatoes loaded on S. S. *Gangway* are for planting in Florida and Georgia.

Guy W. Capps, Inc.

BD.

Exhibit 3

Invoice No. 822

Guy W. Capps, Inc.
GROWER AND SHIPPER
Potatoes and Vegetables
JACKSONVILLE, FLA.
P. O. Box. 1084

Jacksonville, Fla., *January 11, 1949.*

Sold to Atlantic Commission Co., Inc., Jacksonville, Fla.

48,544	Sax Canada No. 1 Seed Potatoes @ $3.35 f. o. b.	$162,622.40
	Less 10,000 Sax Canada No. 1 Seed Potatoes @ $3.65 f. o. b.	36,500.00
		126,122.40

Ex. S. S. *Empire Gangway.*

Guy W. Capps Co., Inc.

Exhibit 4

Sales as per invoices "Guy W. Capps, Inc., Jacksonville, Fla.," "Canada No. 1 Seed Potatoes," "Ex. S. S.* Empire Gangway," *all dated Jan. 11, 1949, and all shipped by trucks

Invoice No.	Purchasers	Price	Bags	Amount
821	Winn Lovett Grocery Co., Jacksonville, Fla.	F. o. b. 375	5,000	$18,750.00
820	W. J. Powell, Thomasville, Ga.	F. o. b. 375	630	2,362.50
819	Crenshaw Bros. Produce Co., Tampa, Fla.	Delivered 390	281	1,095.90
818	Crenshaw Bros. Produce Co., Tampa, Fla.	Delivered 390	240	959.40
817	Crenshaw Bros. Produce Co., Tampa, Fla.	Delivered 390	473	1,844.70
816	Margaret Ann Super Stores, Miami, Fla.	Delivered 400	1,200	4,800.00
815	Margaret Ann Super Stores, Tampa, Fla.	Delivered 390	906	3,510.00
Total			8,730	33,322.50

Exhibit 5

TREATIES AND OTHER INTERNATIONAL ACTS SERIES 1896

POTATOES.—Control of Exports from Canada to the United States. Agreement between the United States of America and Canada. Effected by Exchange of Notes, Signed at Washington November 23, 1948. Entered into force November 23, 1948.

Department of State, Publication 3474 [Literal print]. United States Government Printing Office, Washington: 1949. For sale by the Superintendent of Documents, U. S. Government Printing Office, Washington 25, D. C.: Price 5 cents.

The Canadian Ambassador to the Secretary of State

CANADIAN EMBASSY
AMBASSADE DU CANADA

WASHINGTON, D. C.

No. 538 *November 23rd, 1948.*

SIR: I have the honour to refer to the discussions which have taken place between the representatives

of the Government of Canada and of the Government of the United States of America regarding the problems which would confront the Government of the United States in the operation of its price support and other programmes for potatoes if the imports of Canadian potatoes, during this current crop year, were to continue to be unrestricted. After careful consideration of the various representations which have been made to the Canadian Government on this subject, the Canadian Government is prepared to:

1. Include Irish potatoes in the list of commodities for which an export permit is required under the provisions of the Export and Import Permits Act.

2. Withhold export permits for the movement of table stock potatoes to the United States proper, excluding Alaska.

3. Issue export permits for the shipment of Canadian certified seed potatoes to the United States, but only under the following circumstances:

(a) Export permits will be issued to Canadian exporters for shipments to specified States in the United States and such permits will only be granted within the structure of a specific schedule. The schedule is designed to direct the shipment of Canadian certified seed potatoes into those States where there is a legitimate demand for certified seed potatoes and only during a short period immediately prior to the normal seeding time. A draft of this schedule is now being jointly prepared by Canadian and United States officials.

(b) Export permits would only be granted to Canadian exporters who could give evidence that they had firm orders from legitimate United States users of Canadian seed potatoes. Canadian exporters would also be required to have included in any contract into which they might enter with a United States seed

potato importer a clause in which the importer would give an assurance that the potatoes would not be diverted or reconsigned for table stock purposes.

(c) The Canadian Government would survey the supply of Canadian certified seed potatoes by class and consider the possibility of giving precedence to the export of Foundation and Foundation A classes of certified seed.

(d) The names and addresses of the consignees entered on the export permit would be compiled periodically and this information would be forwarded to the United States Government.

In instituting a system which has the effect of restricting exports of Canadian potatoes to the United States, the Canadian Government recognizes a responsibility to the Canadian commercial grower in certain surplus potato areas and is prepared to guarantee a minimum return on gradable potatoes for which the grower cannot find a sale outlet. Although the details of such a programme have not been finalized, it is anticipated that the Canadian Government will announce, at approximately the same time as potatoes are placed under export control, a floor price which will be effective April 1st, 1949 for certain carlot shipping areas in the East. To implement this programme the Canadian Government would inspect the potato holdings of commercial growers in Prince Edward Island, and several counties of New Brunswick, on or after April 1st and would undertake to pay a fixed price for every hundred pounds of Canada No. 1 potatoes found in the bins. It is not anticipated that any actual payment would be made at that time and it would be understood that if any of the potatoes examined were subsequently sold or used for seed purposes the owner would forfeit any claim for assistance on such potatoes. In other words,

the Canadian Government would make no payment on potatoes which move into export trade, or which are used for seed purposes.

It should be noted that the Canadian proposals to institute export permit control on Canadian potatoes and to inaugurate a price support programme are contingent upon assurances from the United States Government that:

a) The United States Government will not hereafter impose any quantitative limitations or fees on Canadian potatoes of the 1948 crop exported to the United States under the system of regulating the movement of potatoes from Canada to the United States outlined herein.

b) The Canadian Government proposal, as outlined herein, to guarantee a floor price to certain commercial growers in the Maritime Provinces would not be interpreted by United States authorities as either a direct or indirect subsidy and that in consequence there would be no grounds for the imposition of countervailing duties under Section 303 of the United States Tariff Act of 1930.[1]

If the United States Government in its replying note accepts the Canadian proposals and gives to the Canadian Government the assurances required, as outlined above, this note and the reply thereto will constitute an agreement on this subject.

Accept, Sir, the renewed assurances of my highest consideration.

H. H. WRONG.

The Honourable GEORGE C. MARSHALL,
Secretary of State of the United States,
Washington, D. C.

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[1] 46 Stat. 687.

The Acting Secretary of State to the Canadian Ambassador

NOVEMBER 23, 1948.

EXCELLENCY: The Government of the United States appreciates the assurance of the Government of Canada contained in your note No. 528 of November 23, 1948, that the Government of Canada is prepared, contingent upon the receipt of certain assurances from the Government of the United States, to establish the controls outlined therein over the exportation of potatoes from Canada to the United States.

In view of the adverse effect which unrestricted imports of Canadian potatoes would have on the potato programs of the United States and the fact that it is anticipated that the Canadian proposal will substantially reduce the quantity of potatoes which would otherwise be imported into the United States, and in the interest of international trade between the United States and Canada and other considerations, the United States Government assures the Canadian Government that it will not hereafter impose any quantitative limitations or fees on Canadian potatoes of the 1948 crop imported into the United States under the system of regulating the movement of potatoes to the United States outlined in the Canadian proposal.

The Government of the United States also wishes to inform the Canadian Government with respect to that Government's proposal to guarantee a floor price to certain commercial growers in the Maritime Provinces, that in the opinion of the Treasury Department, the operation of such a proposal as outlined by the Canadian Government would not be considered as a payment or bestowal, directly or indirectly, of any bounty or grant upon the manufacture, production, or export of the potatoes concerned and no counter-

vailing duty would, therefore, be levied, under the provisions of Section 303, Tariff Act of 1930, as a result of such operation of the proposal on potatoes imported from Canada.

The United States Government agrees that your note under reference, together with this reply, will constitute an agreement on this subject.

Accept, Excellency, the renewed assurances of my highest consideration.

ROBERT A. LOVETT,
Acting Secretary of State of the United States of America.

His Excellency:
HUME WRONG,
Ambassador of Canada.

Exhibit 6

Domestic unloads of 1948 crop potatoes at Jacksonville and weighted average support price for January 1949

(1) State of origin [1]	(2) Unloads in carlots	(3) Unloads in cwt. [2]	(4) Percentage of total	(5) January support price [3]	(6) Col. 4 × col. 5
Idaho	30	10,800	51.72	$3.05	157.7460
Maine	15	5,400	25.86	3.15	81.4590
Michigan	2	720	3.45	3.10	10.6950
Minnesota	4	1,440	6.90	2.80	19.3200
North Dakota	7	2,520	12.07	2.80	33.7960
Total	58	20,880	100.00		
Weighted average support price	XX	XX	XX	3.05	303.0160

[1] Includes only those States producing types of potatoes which compete with Canadian potatoes.
[2] 360 cwt. per carload.
[3] Support prices are those applicable to the 1948 crop. These apply on the basis of 100 pounds for U. S. No. 1 grade potatoes packed in new burlap or cotton bags, loaded f. o. b. through carrier in carlots or trucklots at shipping point. These prices are designed to provide support at 90 percent of parity.

Source of Data: Col. 2 from records of Market News Division, Fruit and Vegetable Branch, FMA, U. S. D. A. Col. 5 from public announcement of support price schedule for the 1948 crop, dated Aug. 8, 1948.

JULY 22, 1952.

Exhibit 11

Phone 413 L. D. 1420

H. B. WILLIS, INC.

CHARLOTTETOWN, P. E. I., CANADA

Potatoes, Turnips, Fertilizers, Lime

Consumers' packages a specialty

No. 1659.
Lot 834.
Date, Jan. 4/49.
Ex. Souris, P. E. I.
To Jacksonville, Fla.
Car No., *Empire Gangway.*
Broker.
Terms, SD.
Sold to G. W. Capps, Inc., Norfolk, Va., U. S. A.

Freight on 4,854,400 pounds @ 0.40 per cwt, S. S. *Empire Gangway*---------- $19,417.60

Deposition Exhibit

Disposition of Canadian one seed potatoes from S. S. Empire Gangway arrived Jacksonville 1-19-49

SOLD TO THE GREAT ATLANTIC AND PACIFIC TEA COMPANY

Office	Invoice No.	Invoice date	Quantity
Atlanta	K-96	1-13-49	450
	K-103	1-17-49	1,125
	K-109	1-18-49	450
	K-111	1-20-49	450
	K-120	1-25-49	300
	K-127	1-28-49	450
Total			3,225
Birmingham	K-175	1-14-49	300
	K-185	1-18-49	450
	K-197	1-21-49	450
	K-212	1-25-49	9
	K-229	1-28-49	450
Total			1,641
Jacksonville	K-107	1-13-49	495
	K-112	1-13-49	300
	K-115	1-15-49	500
	K-118	1-17-49	500
	K-127	1-20-49	500
	K-130	1-22-49	1,000
	K-139	1-25-49	500
	K-144	1-27-49	500
	K-149	1-28-49	617
Total			5,113
Miami	K-52	1-11-49	455
	K-55	1-15-49	152
	K-57	1-18-49	395
	K-58	1-20-49	100
	K-62	1-21-49	226
	K-68	1-25-49	150
Total			1,478
Tampa	K-66	1-11-49	300
	K-68	1-12-49	125
	K-69	1-13-49	180
	K-72	1-14-49	175
	K-73	1-17-49	330
	K-76	1-18-49	275
	K-82	1-24-49	275
Total			1,560
Grand total			13,827

Deposition Exhibit

Disposition of Canadian one seed potatoes from S. S. Empire Gateway arrived Jacksonville 1-10-49

SOLD TO TRADE

Office	Invoice No.	Invoice date	Customer	Quantity
Atlanta	K-32	1-13-49	C. L. Fain Co.	450
	K-34	1-13-49	Sorrells & Chatman	450
	K-35	1-13-49	Fidelity Fruit & Produce Co	450
	K-36	1-13-49	L. A. Murrah, P. O. Box 2186, Orlando, Fla	450
	K-37	1-13-49	Fidelity Fruit & Produce Co	450
	K-41	1-15-49	Sorrells & Chatman	450
	K-44	1-18-49	Sorrells & Chatman	450
	K-45	1-18-49	Rome Fruit & Produce Co., Rome, Ga	450
	K-46	1-18-49	Fidelity Fruit & Produce Co	450
Total				4,050
Birmingham	K-118	1-18-49	Dixie Produce Co	50
	K-126	1-25-49	Exchange Distributing Co	3
	K-127	1-25-49	Ben Waldrop	6
Total				59
Jacksonville	K-79	1-11-49	Guy W. Capps	10,000
	K-81	1-12-49	Weinstein Brothers, St. Augustine, Fla	200
	K-83	1-13-49	Guy W. Capps	4
	K-84	1-13-49	Arnold Fruit Co	75
Total				10,279
Miami	K-197	1-11-49	Carter Fruit & Produce Co	1,125
	K-198	1-11-49	Griffith Bros. Produce Co., Fort Lauderdale	200
	K-200	1-11-49	Turner Produce Co.	508
	K-201	1-11-49	Powell Brothers Produce Co., W. Palm Beach	280
	K-202	1-11-49	Produce Distributors	300
	K-203	1-11-49	Klefeker Produce Co	450
	K-204	1-11-49	Kaler Produce Co.	350
	K-205	1-13-49	Carter Fruit & Produce Co	425
	K-206	1-13-49	Edwards Produce Co	100
	K-207	1-13-49	Turner Produce Co.	300
	K-209	1-13-49	Diamond Produce Co.	100
	K-210	1-13-49	Produce Distributors	250
	K-211	1-13-49	Select Fruit Co., Palm Beach, Fla	100
	K-212	1-13-49	Beacon Produce Co., Hollywood, Fla.	100
	K-213	1-13-49	Turner Produce Co.	130
	K-214	1-13-49	Kaler Produce Co	300
	K-216	1-14-49	Carter Fruit & Produce Co	450
	K-217	1-14-49	Griffith Bros. Produce Co., Fort Lauderdale	100
	K-219	1-14-49	Klefeker Produce Co	50
	K-222	1-14-49	Kaler Produce Co	150
	K-223	1-14-49	Geo. Matter Produce Co., W. Palm Beach	150
	K-224	1-15-49	Turner Produce Co.	130
	K-225	1-15-49	Kaler Produce Co	120
	K-229	1-18-49	Powell Brothers Produce Co., W. Palm Beach	100
	K-231	1-18-49	Turner Produce Co.	198
	K-232	1-18-49	Edwards Produce Co	100
	K-233	1-18-49	Beacon Produce Co., Hollywood, Fla	100

Disposition of Canadian one seed potatoes from S. S. Empire Gateway arrived Jacksonville 1-19-49—Continued

SOLD TO TRADE

Office	Invoice No.	Invoice date	Customer	Quantity
	K-236	1-20-49	Diamond Produce Co	100
	K-237	1-20-49	Powell Brothers Produce Co., W. Palm Beach	150
	K-238	1-20-49	Turner Produce Co	450
	K-240	1-21-49	Griffith Bros. Produce Co., Fort Lauderdale	200
	K-251	1-24-49	Edwards Produce Co	50
	K-253	1-24-49	Turner Produce Co	100
	K-254	1-25-49	Powell Brothers Produce Co., W. Palm Beach	200
	K-257	1-25-49	Beacon Produce Co., Hollywood, Fla	100
Total				8,100
Mobile	K-2	1-17-49	Mobile Produce Co	450
	K-3	1-17-49	John Vella & Sons	450
	K-4	1-17-49	Warley Fruit & Produce Co	450
	K-5	1-17-49	Mobile Produce Co	450
	K-6	1-17-49	John Vella & Sons	450
Total				2,250
Tampa	K-132	1-11-49	N. Gerace & Co	450
	K-133	1-11-49	Saffold Brothers	400
	K-140	1-11-49	N. Gerace & Co	250
	K-141	1-12-49	N. Gerace & Co	900
	K-142	1-12-49	Crenshaw Brothers	480
	K-143	1-12-49	Diaz & Robinson, Produce, Fla	250
	K-144	1-12-49	Jack Rodriquez, Produce, Fla	500
	K-145	1-12-49	Niederer & Hirsch, Produce, Fla	175
	K-146	1-12-49	Crews & Roberts, Produce, Fla	500
	K-147	1-12-49	Dimond Tager, Produce, Fla	325
	K-148	1-12-49	J. B. Swartwood, Sarasota, Fla	150
	K-149	1-13-49	Crenshaw Brothers	500
	K-150	1-13-49	Diaz & Robinson, Produce, Fla	350
	K-151	1-13-49	Crenshaw Brothers	500
	K-152	1-13-49	Saffold Brothers	275
	K-153	1-14-49	N. Gerace & Co	1,350
	K-154	1-14-49	Dimond Tager, Produce, Fla	250
	K-155	1-14-49	Niederer & Hirsch, Produce, Fla	100
	K-156	1-14-49	Saffold Brothers	400
	K-157	1-14-49	Diaz & Robinson, Produce, Fla	200
	K-158	1-17-49	Jack Rodriquez, Produce, Fla	300
	K-159	1-17-49	Dimond Tager, Produce, Fla	100
	K-160	1-17-49	Niederer & Hirsch, Produce, Fla	75
	K-164	1-20-49	J. B. Swartwood, Sarasota, Fla	200
	K-173	1-21-49	Niederer & Hirsch, Produce, Fla	325
	K-174	1-21-49	N. Gerace & Co	1
	K-175	1-21-49	Saffold Brothers	300
	K-176	1-20-49	Saffold Brothers	294
				10,222
Total trade				34,929

Total Trade	34,929
Total A. & P.	13,827
	48,756

In the United States District Court for the Eastern District of Virginia, at Norfolk.

Civil Action No. 1238

Filed July 23, 1952, WALKLEY E. JOHNSON, Clerk
JEAN C. BASNIGHT, Deputy Clerk

UNITED STATES OF AMERICA *v.* GUY W. CAPPS, INC.

On the 22nd day of July 1952, came the plaintiff and the defendant by their attorneys, and thereupon the Court duly selected and impaneled a jury for the trial of this case, and the jury then heard the opening statements of counsel and the evidence adduced by the plaintiff, and the plaintiff then rested.

Whereupon the defendant moved the Court to direct the jury to return a verdict for the defendant, and after hearing the argument of counsel on the said motion, the Court was of the opinion that the said motion should be sustained and so instructed the jury, and the jury, at the direction of the Court, returned a verdict for the defendant.

Wherefore, upon the said verdict, it is

Ordered that the plaintiff recover nothing of the defendant and that this action be, and it is hereby, dismissed, to all of which rulings the plaintiff excepted.

ALBERT V. BRYAN,
United States District Judge.

Norfolk, Virginia, July 23, 1952.

U. S. GOVERNMENT PRINTING OFFICE: 1953

PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 6542

UNITED STATES OF AMERICA, APPELLANT,

versus

GUY W. CAPPS, INC., APPELLEE.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk

December 13, 1952, record on appeal filed and cause docketed. Same day, original exhibits certified up.

December 18, 1952, appearance of W. R. Ashburn entered for the appellee.

December 23, 1952, appearance of Edward H. Hickey and Joseph Kovner, Attorneys, Department of Justice, and Charles R. Dalton, Jr., Assistant U. S. Attorney, entered for the appellant.

February 28, 1953, brief and appendix of appellant filed.

March 2, 1953, stipulation as to appellant's brief and appendix filed.

March 7, 1953, stipulation as to appellee's brief and appendix filed.

March 9, 1953, brief of appellee filed.

ARGUMENT OF CAUSE

March 18, 1953, (March term, 1953) cause came on to be heard before Parker, Chief Judge, and Soper and Dobie, Circuit Judges, and was argued by counsel and submitted.

OPINION—Filed April 15, 1953

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 6541

UNITED STATES OF AMERICA, APPELLANT,

versus

GUY W. CAPPS, INC., APPELLEE

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk

(Argued March 18, 1953 Decided April 15, 1953)

Before PARKER, *Chief Judge*, and SOPER and DOBIE, *Circuit Judges*

Joseph Kovner, Attorney, Department of Justice (Warren E. Burger, Assistant Attorney General; A. Carter Whitehead, United States Attorney; Austin E. Owen, Special Assistant to the United States Attorney, and Edward H. Hickey, Attorney, Department of Justice, on brief) for Appellant, and W. R. Ashburn (H. M. Jarvis and Ashburn, Agelasto and Seliers on brief) for Appellee.

PARKER, *Chief Judge:*

This is an appeal by the United States from a judgment entered on a verdict directed for the defendant, Guy W. Capps, Inc., in an action instituted to recover damages alleged to have been sustained by the United States as the result of alleged breach by defendant of a contract with respect to the importation of seed potatoes from Canada. The District Court denied a motion to dismiss the action. *United States* v. *Capps* 100 F. Supp. 30. Upon the subsequent trial, however, the court directed a verdict and entered judgment for defendant on the ground that there was no sufficient showing of breach of contract or damage to the United States.

The contract sued on has relation to the potato price support program of 1948 and the executive agreement entered into between Canada and the United States through the Canadian Ambassador and the Acting Secretary of State of the United States. Pursuant to the Agricultural Adjustment Act of 1948, Public Law 897, 80th Cong. 62 Stat. 1247, the United States committed itself to purchase from eligible potato growers, directly or through dealers, all table stock and feed potatoes that could not be sold commercially at a parity price. The purchase and disposal of potatoes under this program was carried out by the Commodity Credit Corporation. In a

manifest attempt to protect the American Potato Market in which this price support program was operating from an influx of Canadian grown potatoes, the Acting Secretary of State of the United States, on November 23, 1948, entered into an executive agreement with the Canadian Ambassador, who was acting for the Canadian Government, to the effect that the Canadian Government would place potatoes in the list of commodities for which export permits were required and that export permits would be granted therefor only to Canadian exporters who could give evidence that they had firm orders from legitimate United States users of Canadian seed potatoes and that "Canadian exporters would also be required to have included in any contract into which they might enter with a United States seed potato importer a clause in which the importer would give an assurance that the potatoes would not be diverted or reconsigned for table stock purposes". In consideration of this agreement on the part of the Canadian Government, the United States Government undertook that it would not impose "any quantitative limitations or fees on Canadian potatoes of the 1948 crop exported to the United States" under the system of regulating the movement of potatoes to the United States outlined in the Canadian proposal and would not consider the Canadian Government's guarantee of a floor price with respect to certain potatoes to be the payment of a bounty or grant and would not levy any countervailing duty on such potatoes under the provisions of section 303 of the Tariff Act of 1930. On November 26, 1948, the Canadian Privy Council added potatoes to the list of products under export permit control and exporters of seed potatoes to the United States could not secure an export permit without complying with the conditions required by the executive agreement.

Defendant, a corporation engaged in business in Norfolk, Virginia, entered into a contract in December 1948 with H. B. Willis, Inc., a Canadian exporter, to purchase 48,544 sacks of Canadian seed potatoes, containing 100 lbs each, to be shipped on the S. S. Empire Gangway docking in Jacksonville, Florida, in January 1949. Defendant's officers admittedly knew of the agreement with Canada and stated in a telegram to an official of the United States Department of Agriculture that the potatoes were being brought in for seed purposes. Defendant sent a telegram to the exporter in Canada on the same day that the potatoes were billed stating that they were for planting in Florida and Georgia. Defendant sold the potatoes while in shipment to the Atlantic Commission Company, a wholly owned agency of Great Atlantic & Pacific Tea Company, a retail grocery organization. No attempt was made to restrict their sale so that they would be used for seed and not for food, and there is evidence from which the jury could properly have drawn the conclusion that they were sold on the market as food displacing potatoes grown in this country and causing damage to the United States by requir-

ing greater purchases of American grown potatoes in aid of the price support program then would have been necessary in the absence of their importation.

On these facts we think that judgment was properly entered for the defendant, but for reasons other than those given by the District Court. We have little difficulty in seeing in the evidence breach of contract on the part of defendant and damage resulting to the United States from the breach. We think, however, that the executive agreement was void because it was not authorized by Congress and contravened provisions of a statute dealing with the very matter to which it related, and that contract relied on which was based on the executive agreement, was unenforceable in the courts of the United States for like reason. We think, also, that no action can be maintained by the government to recover damages on account of what is essentially a breach of a trade regulation, in the absence of express authorization by Congress. The power to regulate foreign commerce is vested in Congress, not in the executive or the courts; and the executive may not exercise the power by entering into executive agreements and suing in the courts for damages resulting from breaches of contracts made on the basis of such agreements.

In the Agricultural Adjustment Act of 1948, Congress had legislated specifically with respect to the limitations which might be imposed on imports if it was thought that they would render ineffective or materially interfere with any program or operation undertaken pursuant to that act. Section 3 of the act, which amended prior statutes, provided in the portion here pertinent (62 Stat. 1244-1250):

> "(a) Whenever the President has reason to believe that any article or articles are being or are practically certain to be imported into the United States under such conditions and in such quantities as to render or tend to render ineffective, or materially interfere with, any program or operation undertaken under this title * * * he shall cause an immediate investigation to be made by the United States Tariff Commission, which shall give precedence to investigation under this section to determine such facts. Such investigation shall be made after due notice and opportunity for hearing to interested parties, and shall be conducted subject to such regulations as the President shall specify.
>
> "(b) If, on the basis of such investigation and report to him of findings and recommendations made in connection therewith, the President finds the existence of such facts, he shall by proclamation impose such * * * quantitative limitations on any article or articles which may be entered for consumption as he finds and declares shown by such investigation to be necessary in order that the entry of such article or articles will not render or tend to render ineffective, or materially interfere

with, any program or operation referred to in subsection (a) of this section * * * *Provided* That no proclamation under this section shall impose any limitation on the total quantity of any article or articles which may be entered * * * for consumption which reduces such permissible total quantity to proportionately less than 50 per centum of the total quantity of such article or articles which was entered * * * for consumption during a representative period as determined by the President: * * *.

There was no pretense of complying with the requirements to this statute. The President did not cause an investigation to be made by the Tariff Commission, the Commission did not conduct an investigation or make findings or recommendations, and the President made no findings of fact and issued no proclamation imposing quantitative limitations and determined no representative period for the application of the 50% limitation contained in the proviso. All that occurred in the making of this executive agreement, the effect of which was to exclude entirely a food product of a foreign country from importation into the United States, was an exchange of correspondence between the Acting Secretary of State and the Canadian Ambassador. Since the purpose of the agreement as well as its effect was to bar imports which would interfere with the Agricultural Adjustment program, it was necessary that the provisions of this statute be complied with and an executive agreement excluding such imports which failed to comply with it was void. *Morgan* v. *United States* 304 U. S. 1; *Panama Refining Co.* v. *Ryan* 293 U. S. 388. As was said by Chief Justice Hughes in the case last cited: "We are not dealing with action which, appropriately belonging to the executive province, is not the subject of judicial review, or with presumptions attaching to executive action. * * * we are concened with the question of the delegation of legislative power. * * *".

It is argued, however, that the validity of the executive agreement was not dependent upon the Act of Congress but was made pursuant to the inherent powers of the President under the Constitution. The answer is that while the President has certain inherent powers under the Constitution such as the power pertaining to his position as Commander in Chief of Army and Navy and the power necessary to see that the laws are faithfully executed, the power to regulate interstate and foreign commerce is not among the powers incident to the Presidential office, but is expressly vested by the Constitution in the Congress. It cannot be upheld as an exercise of the power to see that the laws are faithfully executed, for, as said by Mr. Justice Holmes in his dissenting opinion in *Myers* v. *United States* 272 U. S. 52, 177, "The duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power". In the recent case of *Youngstown Sheet & Tube Co.* v. *Sawyer* 343 U. S. 579, the

Supreme Court dealt with the question in the following pertinent language:

> "Nor can the seizure order be sustained because of the several constitutional provisions that grant executive power to the President. In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the law-making process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute. The first section of the first article says that 'All legislative Powers herein granted shall be vested in a Congress of the United States * * *'. After granting many powers to the Congress, Article I goes on to provide that Congress may 'make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof.'"

The rule was well stated by Mr. Justice Jackson in his concurring opinion in the case last cited as follows:

> "When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake, is the equilibrium established by our constitutional system."

We think that whatever the power of the executive with respect to making executive trade agreements regulating foreign commerce in the absence of action by Congress, it is clear that the executive may not through entering into such an agreement avoid complying with a regulation prescribed by Congress. Imports from a foreign country are foreign commerce subject to regulation, so far as this country is concerned, by Congress alone. The executive may not by-pass congressional limitations regulating such commerce by entering into an agreement with the foreign country that the regulation be exercised by that country through its control over exports. Even though the regulation prescribed by the executive agreement be more desirable than that prescribed by Congressional action, it is

the latter which must be accepted as the expression of national policy.

It is argued that irrespective of the validity of the executive agreement, the contract sued on was a valid contract between defendant and the Canadian exporter and that since the contract was made for the benefit of the United States, this country may maintain action upon it.* The answer is that the contract was but the carrying out of the executive agreement entered into in contravention of the policy declared by Congress; and the courts of the United States will not lend their aid to enforcing it against the public policy of the country so declared. As stated, the regulation of imports from foreign countries is a matter for Congress and, when Congress has acted, the executive may not enforce different regulations by suing on contracts made with reference thereto. As said by the Supreme Court in *Oscanyan* v. *Arms. Co.* 103 U. S. 261, 277, "Contracts permissible by other countries are not enforceable in our courts, if they contravene our laws, our morality or our policy."

We think the action for damages may not be sustained for the additional reason that Congress has created no such right of action and we think that the principles laid down by the Supreme Court in *United States* v. *Standard Oil Co. of California* 332 U. S. 301, are applicable here. This is not a case where the government stands in the shoes of a private person and sues on a contract which it has made as such. It is a case where the government sues in its sovereign capacity to recover damages which it claims to have sustained while engaged in the exercise of governmental powers, as the result of the violation of a contract made between other persons. No such cause of action exists under federal law; and we do not think that analogies drawn from private contract law, permitting suit by one for whose benefit a contract is made to sue thereon, can properly be followed here. "The exercise of judicial power to establish a new liability would amount to an unwarranted intrusion by the courts into a field properly within the control of Congress and as to a matter concerning which it had seen fit to take no action". *Gartner* v. *United States* 9 Cir. 166 F. 2d 728. In the case of *United States* v. *Standard Oil Co. of California, supra*, the Supreme Court, in denying recovery by the government in an action grounded in analogies to private tort law, used the following language which we think pertinent, viz.:

> "Moreover, as the Government recognizes for one phase of the argument but ignores for the other, we have not here simply a question of creating a new liability in the nature of a tort. For grounded though the argument is in analogies drawn from

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* There is a holding to that effect in an unreported decision of the United States District Court for the Eastern District of New York in the case of *United States* v. *Carpenter*.

that field, the issue comes down in final consequence to a question of federal fiscal policy, coupled with the considerations concerning the need for and the appropriateness of means to be used in executing the policy sought to be established. The tort law analogy is brought forth, indeed, not to secure a new step forward in expanding the recognized area for applying settled principles of that law as such, or for creating new ones. It is advanced rather as the instrument for determining and establishing the federal fiscal and regulatory policies which the Government's executive arm thinks should prevail in a situation not covered by traditionally established liabilities.

"Whatever the merits of the policy, its conversion into law is a proper subject for congressional action, not for any creative power of ours. Congress, not this Court or the other federal courts, is the custodian of the national purse. By the same token it is the primary and most often the exclusive arbiter of federal fiscal affairs. And these comprehend, as we have said, securing the treasury or the government against financial losses however inflicted, including requiring reimbursement for injuries creating them, as well as filling the treasury itself."

For the reasons stated, we do not think that the United States can maintain the action for damages. The judgment for defendant will accordingly be affirmed.

Affirmed.

JUDGMENT—Filed and Entered April 15, 1953

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 6541

UNITED STATES OF AMERICA, APPELLANT,

vs.

GUY W. CAPPS, INC., APPELLEE

Appeal from the United States District Court for the Eastern District of Virginia

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged

by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

April 15th, 1953.

JOHN J. PARKER,
Chief Judge, Fourth Circuit.

May 18, 1953, mandate issued and transmitted to the United States District Court at Norfolk, Virginia, in due form.

Same day, the record on appeal and original exhibits returned to the Clerk at Norfolk, Virginia.

July 31, 1953, the record on appeal and original exhibits received from the Clerk of the District Court.

STIPULATION

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

UNITED STATES OF AMERICA, PETITIONER

v.

GUY W. CAPPS, INCORPORATED, RESPONDENT

It is hereby stipulated and agreed, by and between counsel for the respective parties to the above entitled cause, that for the purpose of the petition for a writ of certiorari the printed record may consist of the following:

1. Appendix to brief of appellant.
2. The proceedings had before the United States Court of Appeals for the Fourth Circuit.

It is further stipulated and agreed, that petitioner will cause the Clerk of the United States Court of Appeals for the Fourth Circuit to file with the Clerk of the Supreme Court of the United States the complete certified record on appeal from the District Court of the United States for the Eastern District of Virginia; and in the event the petition for a writ of certiorari is granted, then for the purpose of hearing and determining the case on the merits the record in the Supreme Court of the United States shall consist of—

1. Appendix to brief of appellant.
2. The proceedings had before the United States Court of Appeals for the Fourth Circuit.
3. The complete certified record on appeal from the District Court of the United States for the Eastern District of Virginia to the United States Court of Appeals for the Fourth Circuit, but the portion of the record not included in the Appendix to the brief of appellant need not be printed.

It is further stipulated and agreed, that the parties hereto may refer in their briefs and argument to the record filed in the Supreme Court of the United States, including any part thereof which has not been printed.

OSCAR H. DAVIS,
Acting Solicitor General,
Counsel for Petitioner.
W. R. ASHBURN,
Counsel for Respondent.

CLERK'S CERTIFICATE

UNITED STATES OF AMERICA,
Fourth Circuit, ss:

I, Claude M. Dean, Clerk of the United States Court of Appeals for the Fourth Circuit, do certify that the foregoing is a true copy of the appendix to appellant's brief and the proceedings in the said Court of Appeals in the therein entitled cause, as the same remain upon the records and files of the said Court of Appeals, and constitute and is a true transcript of the record and proceedings in the said Court of Appeals in said cause, made up in accordance with the stipulation of counsel for the respective parties, for use in the Supreme Court of the United States on application for writ of certiorari.

In testimony whereof, I hereto set my hand and affix the seal of the said United States Court of Appeals for the Fourth Circuit, at Richmond, Virginia, this 31st day of July, A. D., 1953.

[SEAL.]

CLAUDE M. DEAN,
Clerk of the United States Court of Appeals for the Fourth Circuit.

SUPREME COURT OF THE UNITED STATES

No. —, October Term, 1953

UNITED STATES OF AMERICA, PETITIONER,

vs.

GUY W. CAPPS

ORDER

Upon consideration of the application of counsel for the petitioner,
It is ordered that the time for filing a petition for certiorari in the above-entitled case be, and the same is hereby, extended to and including September 12th, 1953.

TOM C. CLARK,
Associate Justice of the Supreme Court of the United States.

Dated this 10th day of July, 1953.

Supreme Court of the United States

No. 331

OCTOBER TERM, 1953

UNITED STATES OF AMERICA, PETITIONER
vs.
GUY W. CAPPS, INC.

Order allowing certiorari

Filed November 16, 1953

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompany the petition shall be treated as though filed in response to such writ.

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No. [illegible]

In the Supreme Court of the United States

October Term, 1953

UNITED STATES OF AMERICA, petitioner

v.

GUY W. DAVIS, [illegible]

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Constitutional provisions and statutes involved	3
Statement:	
1. The potato price support program and the Executive Agreement between the United States and Canada	3
2. Respondent's potato imports	6
3. The proceedings below	9
Reasons for granting the writ	11
Conclusion	26
Appendix A	27
Appendix B	32

CITATIONS

Cases:	
Altman & Co. v. *United States*, 224 U. S. 583	14
American Banana Co. v. *United Fruit Co.*, 213 U. S. 347	16
Burnet v. *Brooks*, 288 U. S. 378	12
Chicago & Southern Air Lines v. *Waterman S. S. Co.*, 333 U. S. 103	15, 16
Cotton v. *United States*, 11 How. 229	24
Dugan v. *United States*, 3 Wheat. 172	24
Federal Land Bank v. *Bismarck Lumber Co.*, 314 U. S. 95	24
Field v. *Clark*, 143 U. S. 649	14, 19, 20
Foley Bros. v. *Filardo*, 336 U. S. 281	16
Fong Yue Ting v. *United States*, 149 U. S. 698	12, 16
Francis & Eliza, The, 108 Fed. 541, reversed, 8 Wheat. 398	19
Graves v. *New York ex rel. O'Keefe*, 306 U. S. 466	24
Holmes v. *Jennison*, 14 Pet. 540	13
Knauff v. *Shaughnessy*, 338 U. S. 537	16
Knox v. *Lee*, 12 Wall. 457	12
Monaco v. *Mississippi*, 292 U. S. 313	14
Panama Refining Co. v. *Ryan*, 293 U. S. 388	18, 19
Steele v. *Bulova Watch Co.*, 344 U. S. 280	16
United States v. *Belmont*, 301 U. S. 324	14
United States v. *Carpenter*, E. D. N. Y., Civil No. 9799, May 13, 1949	26
United States v. *Curtiss-Wright Corp.*, 299 U. S. 304	12, 13, 14, 16, 17, 18, 19

272392—53——1

Cases—Continued Page

United States v. *LeRoy Dyal Co.*, 186 F. 2d 460, certiorari denied, 341 U. S. 926 25
United States v. *Pink*, 315 U. S. 203 ..... 12, 14, 15
United States v. *Spelar*, 338 U. S. 217 16
United States v. *Standard Oil Co. of California*, 332 U. S. 301 24
United States ex rel. Marcus v. *Hess*, 317 U. S. 537 24
Watts v. *United States*, 1 Wash. Ter. 288 13
Youngstown Co. v. *Sawyer*, 343 U. S. 579 ..... 14, 17

Constitution and Statutes:

Constitution of the United States:
Article I, Section 10, Pars. 1 and 3 ..... 13, 27
Article II, Section 2, Par. 1 ..... 12, 27
Articles of Confederation:
Article IX 19
Act of August 24, 1935, 49 Stat. 773:
Section 31 21
Act of June 28, 1950, 64 Stat. 261:
Section 3 23
Agricultural Adjustment Act, as amended:
Section 22 ..... 4, 6, 17, 21, 22, 27
Section 22 (a) 27
Section 22 (b) 28
Section 22 (c) 29
Section 22 (d) 29
Section 22 (e) 30
Section 22 (f) 22, 23, 30
Agricultural Act of 1948, 62 Stat. 1247, 1249, 7 U. S. C. 624:
Section 1 (b) 3, 30
Section 3 ..... 4, 27
Anti-dumping Act of 1921, 42 Stat. 11, 19 U. S. C. 160–171 21
Meat Inspection Act of 1890, 26 Stat. 414, Sec. 5 20
National Industrial Recovery Act:
Section 3 (e) 22
Reciprocal Trade Act, 48 Stat. 943, 19 U. S. C. 1351–1354 21
Tariff Act of 1890, 26 Stat. 612:
Section 3 ..... 20, 21
Tariff Act of 1894, 28 Stat. 569, Sec. 71 20
Tariff Act of 1909, 36 Stat. 82, Sec. 2 21
Tariff Act of 1922, 42 Stat. 944:
Section 317 21
Tariff Act of 1930, 46 Stat. 687, 704, 19 U. S. C. 1303, 1338:
Section 303 ..... 6, 21
Section 338 21
Trade Agreements Extension Act of June 16, 1951, 65 Stat 72, 75:
Section 8 (b) 5, 23

Constitution and Statutes—Continued — Page

Trade Agreements Extension Act of 1953, 67 Stat. 472:
Section 104 ..... 5, 23
19 U. S. C. 130, 131 21
46 U. S. C. 141, 142 21

Miscellaneous:
Annual Message of President Grant, December 5, 1870, Foreign Relations of the United States, 1870, pp. 11–13 .. 19
6 C. F. R. (1949 ed.) 648.51–65 3
6 C. F. R. 648.64 ..... 3, 4
26 Cong. Rec. 6981–7000 20
26 Cong. Rec. 6987 20
26 Cong. Rec. 6991 20
79 Cong. Rec. 9591–9592 22
79 Cong. Rec. 11497–11526 22
79 Cong. Rec. 11503 ..... 18, 21
94 Cong. Rec. 8450 5
94 Cong. Rec. 8450–8451 5
Crandall, *Treaties and Their Making* (2d ed., 1916) 102 ... 13
Executive Agreement of November 23, 1948 15
Executive Agreements and the Proposed Constitutional Amendments to the Treaty Power, 51 Michigan L. R. 1202, 1206–1207 13
Extension of Reciprocal Trade Agreements Act, Hearings before the Committee on Finance, United States Senate, 81st Cong., 1st Sess., on H. R. 1211, pp. 844, 898–899, 918–921 ..... 18, 23
Farrand, *The Records of the Constitutional Convention of 1787*, Vol. II, p. 543; Vol. IV (Rev. Ed., 1937), p. 58 13
Federalist, Nos. 64 and 75 19
Foreign Relations of the United States, 1934, Vol. III, pp. 801–805 22
Hackworth, *Digest of International Law*, Vol. 5, pp. 392, 397 . 13
H. Rep. 537, 82d Cong., 1st Sess., p. 4 23
Levitan, *Executive Agreements: A Study of the Executive in the Control of the Foreign Relations of the United States* (1940), 35 Ill. L. Rev. 365 13
McClure, *International Executive Agreements* (1941), pp. 56 *et seq.*, 84–92, 173 ff 15, 21
Moore, *Treaties and Executive Agreements* (1905), 20 Political Science Quarterly 385, 389–393 13
Policy of United States Concerning Generalization of Tariff Concessions, 12 Department of State Press Release 212, 214, 219 21
Riesenfeld, *International Relations*, 25 Cal. L. R. 643, 670–672 13
Sayre, *The Constitutionality of the Trade Agreements Act*, (1939), 39 Col. L. Rev. 751 ..... 13, 15

Miscellaneous—Continued

	Page
Sen. Exec. Doc. 119, 52d Cong., 1st Sess., p. 2	20
S. Rep. 1375, 81st Cong., 2d Sess., p. 4	23
S. Rep. 299, 82d Cong., 1st Sess., p. 7	23
Vattel, *Law of Nations* Book II, Chapters XII, XIV	14
Vattel, *The Law of Nations* (Classics of Int. Law Ed.), Vol. 3, XXIX-XXX	14
Warren, *The Making of the Constitution*, pp. 653–658	13
Weinfeld, *What did the framers of the federal Constitution mean by "Agreements or Compacts?"*, 3 University of Chicago L. R. 453	13

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 331

UNITED STATES OF AMERICA, PETITIONER

v.

GUY W. CAPPS, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Acting Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment entered in this case on April 15, 1953, by the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The memorandum opinion of the United States District Court for the Eastern District of Virginia denying defendant's motion to dismiss the complaint (R. 13–16) has been reported at 100 F. Supp. 30. The oral opinion of the District Court granting defendant's motion for a directed verdict at the end of the plaintiff's evidence (R. 147–149) has not been reported. The opinion of

the United States Court of Appeals (R. 164–170) has been reported at 204 F. 2d 655.

JURISDICTION

The judgment of the Court of Appeals was entered on April 15, 1953 (R. 170). On July 10, 1953, Mr. Justice Clark extended the time within which the petition for a writ of certiorari might be filed to and including September 12, 1953 (R. 173). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the President has general nonstatutory power to enter into an Executive Agreement with a foreign country in order to aid and implement a Congressional policy regulating commerce.

2. Whether Section 22 of the Agricultural Adjustment Act limited the Executive to that section's specific procedural and substantive remedies against damaging imports of subsidized commodities, and precluded the Executive from exercising his authority to enter into Executive Agreements to attain the same ends as the remedies provided in Section 22.

3. Whether, where the Federal Government as regulator of foreign trade is the beneficiary of a third-party beneficiary contract, judicial enforcement of the promise requires specific Congressional authorization.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent provisions of the Constitution and of the statutes involved are set forth in Appendix A, *infra*, pp. 27–31.

STATEMENT

1. *The Potato Price Support Program and the Executive Agreement between the United States and Canada.* Under Section 1 (b) of the Agricultural Act of 1948 (*infra*, pp. 30–31), the United States undertook to support potatoes at 90 percent of the parity price. This program was carried out by means of contracts in which the United States, acting through the Commodity Credit Corporation, agreed to purchase from eligible growers and dealers all potatoes that could not be sold commercially at 90 percent of the parity price (R. 164 and 6 C. F. R. (1949 ed.) 648.51–65).[1]

The 1948 potato crop was one of the largest recorded in the United States as well as in the Maritime Provinces of Canada (R. 73). Since the Canadian unsupported price levels were considerably lower than those in the United States,[2] it became profitable to import Canadian potatoes

[1] The parity prices varied from State to State and increased from July 1948 to March–April 1949. The lowest parity price was $2.15 for July 1948 in North Dakota and Minnesota, the highest $3.50 for March–April for the mid-Atlantic States. 6 C. F. R. 648.64. See also R. 87–88.

[2] In the instant case, the price per cwt. was $1.82 at Charlottetown, P. E. I., in December 1948 (R. 150–151). Ninety

into the United States in spite of custom and freight charges.[3] On the other hand, the influx of Canadian potatoes was bound to decrease the quantity of domestic potatoes which could be sold in the open market at 90 percent of parity, thus materially increasing the cost of the price support program to the Government.

Congress anticipated that imports might interfere substantially with the price support program. Section 22 of the Agricultural Adjustment Act, as amended by Section 3 of the Agricultural Act of 1948 (*infra*, pp. 27–30), contains a method for dealing with the problem. It provides for a direction by the President to the Tariff Commission to investigate the situation, an investigation by the Tariff Commission after due notice and opportunity for hearing to interested parties, a report by the Tariff Commission containing findings and recommendations, findings of fact by the President on the basis of the report, and finally imposition on the objectionable imports of fees not to exceed 50 per centum *ad valorem* or of quantitative limitations.

Two considerations were believed to make it inadvisable to apply Section 22 to the potato situation. While suited to work out a long-range agri-

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percent of parity for Maine potatoes at the same time was $2.70 (6 C. F. R. 648.64).

[3] Custom dues amounted to $0.75 per cwt. (R. 76), freight from Prince Edward Island to Florida $0.40 per cwt. (R. 77, 158).

cultural program, Section 22 was too complicated and slow to cope with the temporary problems caused by the sudden bumper crop of a perishable commodity. In 1948 the customary time for the Tariff Commission to act was 9–10 months. 94 Cong. Rec. 8450.[4] Moreover, it was likely that the imposition of the additional fees or import limitations by unilateral action would result in retaliation by Canada, one of our best customers for fruits and vegetables (R. 143).

In these circumstances, the President did not avail himself of the machinery set forth in Section 22. Instead, the two Governments attempted to solve the mutual problems caused by the large potato surplus, not by independent use of national legislation, but by way of bilateral negotiation. In the resulting agreement, signed on November 23, 1948 (R. 152–155), Canada undertook to place potatoes under export control, not to issue licenses for the exportation of the table stock potatoes to the United States, and to grant export licenses for certified seed potatoes to the United States only if the contract between the Canadian exporter and

[4] It was said that there was too little time left before the presidential conventions of 1948 to improve on the procedures of Section 22 (94 Cong. Rec. 8450–8451). See, however, Section 104 of the Trade Agreements Extension Act of 1953, 67 Stat. 472, modifying the procedures under Section 22, which permits the President to take immediate action pending the proceedings before the Tariff Commission, and also see the Trade Agreements Extension Act of 1951, 65 Stat. 72, 75.

272392—53——2

the United States importer included a clause "in which the importer would give an assurance that the potatoes would not be diverted or reconsigned for table stock purposes" (R. 153–154).[5]

In exchange, the United States agreed not to impose the quantitative limitations or fees provided for in Section 22 upon Canadian potatoes of the 1948 crop and, furthermore, gave assurances that certain anticipated potato price support measures of the Canadian Government, necessitated by the limitations upon the export of table stock potatoes, would not be considered subsidies within the meaning of Section 303 of the Tariff Act of 1930 (46 Stat. 687, 19 U. S. C. 1303), authorizing the imposition of countervailing duties. The agreement went into effect on November 23, 1948 (R. 152),[6] and came to an end on June 20, 1949 (R. 136). On November 26, 1948, Canada issued an Order in Council subjecting potatoes to export control (R. 98–99).

2. *Respondent's Potato Imports.* In December 1948, respondent, a Virginia corporation which grows and ships potatoes and vegetables on the eastern seaboard of the United States (R. 1, 4, 150, 151, 158), purchased approximately 50,000 100-pound bags[7] of potatoes from a Canadian ex-

[5] As their names imply, table stock potatoes are intended for consumption and seed potatoes for planting.

[6] According to R. 136, it went into effect on December 1, 1948.

[7] Potatoes are commonly sold in 100-pound bags (R. 109).

porter, H. B. Willis (R. 13, 150–151). In view of the requirement of the Executive Agreement and of the Canadian Order in Council that the American importer give assurances that the potatoes would be used for seed purposes only and not diverted or reconverted for table stock purposes (*supra*, pp. 5–6), respondent wired Willis on December 27, 1948 (R. 18, 151):

> Certified seed potatoes loaded on S. S. *Gangway* are for planting in Florida and Georgia.[8]

The S. S. *Gangway*, on which the potatoes were loaded, left Canada during the last days of December 1948 (R. 18) and arrived off Jacksonville, Florida, on January 9, 1949 (R. 18). On January 11, 1949, respondent sold all but 10,000 bags of the potatoes, without restrictions as to the disposition of the potatoes (R. 60, 151, 165), to the Atlantic Commission Company (R. 151), a fruit and vegetable buying subsidiary of the Great

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[8] Respondent was well aware of the purpose and implications of this telegram. When questioned by the U. S. Department of Agriculture about a statement allegedly made by respondent that it had special permission to sell seed potatoes for edible use (R. 101–102), it denied having made such statement (R. 103) and added:

"I realize fully the agreement with Canada, its intent and want to and expect to cooperate with the program. I am only bringing in seed [potatoes] for seed purposes * * *." (R. 104.)

The Court of Appeals found that respondent's officers knew of the Executive Agreement and its requirements (R. 165).

Atlantic and Pacific Tea Company (R. 41).[9] The Atlantic Commission Company resold some 13,600 bags to the A. & P., the rest to a number of fruit and vegetable wholesale dealers located in Florida, Georgia, and Alabama (R. 47–48, 159–161).[10] The evidence tends to indicate that most, if not all, of the potatoes were sold to retail establishments as table stock potatoes (R. 22–38, 165).

This venture, made possible by respondent's misrepresentations to the Canadian and United States authorities, turned out to be highly profitable. The potatoes bought per invoice dated January 4, 1949, at $88,350.08 (R. 150–151) were resold January 11 for $162,622.40 (R. 151). Taking into account the freight charges of $19,417.60 (R. 158) and the customs duties of approximately $37,000.00,[11] respondent was able to make within a week a profit of approximately $18,000.00 or 20 percent, while saddling the United States with the virtually certain liability of having to purchase al-

[9] The Great Atlantic and Pacific Tea Co. is essentially a retail grocery organization (R. 41).

[10] Atlantic Commission Co. resold to respondent 10,000 bags of potatoes at $3.65 per bag (R. 44–45, 151). Respondent disposed of these potatoes at prices ranging from $3.75 to $4.00 (R. 65–66; Exh. 4, R. 152).

Of the 48,553 bags of potatoes purchased by it, Atlantic Commission Co. resold 10,000 to respondent, as just stated, and sold 13,627 to the A. & P. (R. 159) and 24,926 (34,926 less 10,000 to respondent) to various wholesalers (R. 160–161).

[11] $0.75 per cwt. (see *supra*, fn. 3, p. 4).

most 50,000 additional bags of potatoes at an average price of $3.00.[12]

3. *The Proceedings Below.* On January 17, 1951, the United States brought suit in the District Court. Its complaint was based essentially on the theory that the clause "certified seed potatoes * * * are for planting * * *," contained in the contract between respondent and the Canadian exporter (*supra*, p. 7), constituted a promise for the benefit of the United States, that respondent had breached this contract, and that as a result of this breach the United States was compelled to purchase 48,544 additional bags of potatoes under the Agricultural Act of 1948 at a net cost of $150,486.00.[13] The complaint asked for $150,486.00 in damages (R. 1–4).

The District Court in sustaining the complaint against a motion to dismiss (R. 13–16) held that respondent had made a promise to use the potatoes for seed only and that the United States was the beneficiary of this undertaking (R. 15–16). At the trial the District Court, however, directed a verdict in favor of respondent at the conclusion of the Government's case (R. 147–149) on the grounds that respondent had not breached its agreement and that the Government had not shown any damages.

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[12] See *supra*, fns. 1, p. 3, and 10, p. 8.

[13] This sum is based not on the support price paid by the United States for 48,544 bags of potatoes but on the net costs to the United States (cf. R. 30–32).

The Court of Appeals affirmed the decision of the District Court but on other grounds (R. 164–170). It concurred in the finding of the District Court that the telegram stating that the potatoes were for planting was of a contractual nature designed to benefit the United States (R. 166, 169). Disagreeing with the District Court, the Court of Appeals had "little difficulty in seeing in the evidence breach of contract on the part of defendant and damage resulting to the United States from the breach" (R. 166).[14] It sustained the decision of the District Court because it considered the contract unenforceable for two reasons. First, it held the contract merely sought to carry out the Executive Agreement and that the Agreement was void because (*a*) the President lacked the power to enter into the Executive Agreement since he had not been granted specific authority either by the Constitution or by Congress (R. 166–169), and (*b*) the President could not avoid compliance with the specific statutory procedure provided by Congress through the expedient of entering into an Executive Agreement. Second, the court held that it could not give effect to the contract unless Congress had expressly authorized that method of

[14] The court found that "there is evidence from which the jury could properly have drawn the conclusion that they were sold on the market as food displacing potatoes grown in this country and causing damage to the United States by requiring greater purchases of American grown potatoes in aid of the price support program than would have been necessary in the absence of their importation" (R. 165–166).

enforcing "what is essentially a breach of a trade regulation" (R. 166, 169–170).

REASONS FOR GRANTING THE WRIT

This is an already notable case in which the Fourth Circuit, by invalidating a commercial agreement representative of numerous other executive compacts, has sought to confine the President's power to make Executive Agreements within bounds far narrower than those set by this Court and by historic practice. In addition, finding conflict with the Agricultural Adjustment Act where none existed, the court has rejected an agreement which fully conformed to Congressional policy and implemented the subsidy program established by the Act. The result is a restrictive decision casting such serious doubt on the accepted powers of the Executive as the country's instrument in foreign affairs that it requires review and correction by this Court.

1. The initial ruling below—that the President cannot without Congressional authorization consummate an international agreement which regulates foreign commerce, because that field is reserved by the Constitution to Congress (R. 166–167)—is inconsistent with this Court's decisions defining the Executive's foreign relations powers, as well as with the understanding of many decades.[15] As an attribute "of sovereignty" the na-

[15] On the importance of Executive Agreements as a means of carrying out current diplomatic business, see the authori-

tional government "is vested with all the powers of government necessary to maintain an effective control of international relations." *Burnet* v. *Brooks*, 288 U. S. 378, 396; *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 318; cf. *Knox* v. *Lee*, 12 Wall, 457, 555; *Fong Yue Ting* v. *United States*, 149 U. S. 698, 711. And since the acts of Congress are ineffective outside the national territory (*United States* v. *Curtiss-Wright Corp.*, *supra*, at 318), the foreign relations power is mainly vested in the President who is the organ of the United States in the field of foreign relations (*United States* v. *Curtiss-Wright Corp.*, *supra*, at 319–320; *United States* v. *Pink*, 315 U. S. 203, 222–223).

In major matters the President deals with other nations through formal treaties, but lesser arrangements are open for minor issues. The very circumstance that the Constitution (Art. II, Section 2, par. 1) provides that treaties made by the President have to be ratified by the Senate indicates that international agreements not amounting to treaties may be concluded by the President alone.[16] International activities are not

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ties cited in fn. 17, *infra*, p. 13. We have been advised by the Department of State that the validity of several hundred Executive Agreements would become questionable if this ruling became accepted law; it would also cast substantial doubt on the authority of the United States to enter into routine arrangements with foreign nations.

[16] Cf. *Knox* v. *Lee*, 12 Wall. 457, 534. It has been suggested that the power to enter into "such international agreements

limited to the conclusion of formal treaties; they include a host of temporary and less formal arrangements, understandings, and compacts without which current diplomatic business could not be carried on.[17]

This distinction between formal treaties[18] and lesser agreements was well known to the draftsmen of the Constitution.[19] It has been recognized from the beginning of our life as a federal nation, and the Presidents have regularly

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as do not constitute treaties," if not based upon the Constitution, would flow by virtue of the law of nations from the very fact of sovereignty. *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 318.

[17] Hackworth, *Digest of International Law*, Vol. 5, pp. 392, 397; Moore, *Treaties and Executive Agreements* (1905), 20 Pol. Sci. Quar. 385, 389–393; Crandall, *Treaties and Their Making* (2d ed., 1916) 102; Sayre, *The Constitutionality of the Trade Agreements Act* (1939), 39 Col. L. Rev. 751; Levitan, *Executive Agreements: A Study of the Executive in the Control of the Foreign Relations of the United States* (1940), 35 Ill. L. Rev. 365; Riesenfeld, *International Relations*, 25 Cal. L. Rev. 643, 670–672; Comment: *Executive Agreements and the Proposed Constitutional Amendments to the Treaty Power*, 51 Mich. L. Rev. 1202, 1206–1207; cf. *Watts* v. *United States*, 1 Wash. Ter. 288, 294.

[18] The records of the Federal Convention indicate that the framers of the Constitution were essentially concerned with peace treaties and treaties giving away national territory or affecting fishing and navigation rights. Farrand, *The Records of the Constitutional Convention of 1787*, Vol. II, p. 543; Vol. IV (Rev. Ed., 1937), p. 58. Warren, *The Making of the Constitution*, pp. 653–658.

[19] Significantly, Art. I, Section 10, pars. 1 and 3, of the Constitution differentiates between treaties, agreements, and compacts. Cf. *Holmes* v. *Jennison*, 14 Pet. 540, 572; Weinfeld, *What did the framers of the federal Constitution mean*

availed themselves, without legislative permission, of the device of the nontreaty agreement or compact. See fn. 17, *supra*, p. 13. This Court has explicitly confirmed the President's capacity, subject to constitutional limitations, to enter into such executive agreements in appropriate cases. *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 318, 320; *United States* v. *Belmont*, 301 U. S. 324, 331; *United States* v. *Pink*, 315 U. S. 203, 229–230; cf. *Field* v. *Clark*, 143 U. S. 649, 681 ff; *Altman & Co.* v. *United States*, 224 U. S. 583; *Monaco* v. *Mississippi*, 292 U. S. 313, 331.[20] Executive agreements so concluded have the same status as treaties (*Altman & Co.* v. *United States*, 224 U. S. 583) and are the supreme law of the land (*United States* v. *Belmont*, 301 U. S. 324, 331; *United States* v. *Pink*, 315 U. S. 203, 230), subject to constitutional limitations.

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by "Agreements or Compacts?", 3 Univ. of Chi. L. Rev. 453. The distinction between treaties and less formal, temporary agreements was discussed in detail in Vattel, *Law of Nations*, Book II, Chapters XII, XIV. On the profound influence of Vattel upon the leaders of the American Revolution, see Vattel, *The Law of Nations* (Classics of Int. Law Ed.), Vol. 3, xxix–xxx.

[20] The *Curtiss-Wright* case involved a presidential proclamation made pursuant to Congressional authority but the decision rests on the basic consideration that in the field of foreign relations the President is invested with "a very delicate, plenary, and exclusive power * * * which does not require for its exercise an act of Congress" (299 U. S. 320). Cf. the concurring opinion of Mr. Justice Jackson in *Youngstown Co.* v. *Sawyer*, 343 U. S. 579, 635–636, fn. 2. The executive agreement which was upheld in *United States* v. *Belmont*, 301 U. S. 324, 330–331, and *United States* v. *Pink*, 315 U. S.

The appropriateness of the Executive Agreement of November 23, 1948, is proved by its heritage in our history. General commercial arrangements by the President go back to the early 19th century. See Sayre, *op. cit.*, fn. 17, *supra*, at pp. 770–771; McClure, *International Executive Agreements* (1941), pp. 56 *et seq.* For over sixty years there have been agreements specifically dealing with imports, duties, and customs reciprocity. *Infra*, pp. 18–22. This has been a well-marked area in which Presidents have not hesitated to make international commitments, especially in supplement and aid of Congressional programs and policies.

Nothing in the Constitution forbids this established practice. The specific grant to Congress of legislative power over foreign commerce, stressed in the decision below (R. 167–168), does not exclude this field from the reach of the President's foreign relations power. Authority to adjust claims against the United States is a recognized Congressional power but the President's power to make such settlements in the international sphere has never been doubted. See, e. g., *United States* v. *Pink*, 315 U. S. 203, 240 (concurring opinion). At the water's edge, Presidential authority and

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203, 223, was entered into without any previous Congressional authorization; and see *Chicago & Southern Air Lines* v. *Waterman S. S. Co.*, 333 U. S. 103, 109, stressing the President's powers in the field of foreign affairs which are not derived from Congressional delegation.

Congressional power are frequently concurrent; executive foreign relations power would be virtually nonexistent if it were barred from all those topics on which Congress has the right to legislate. Indeed, coexistence of these double powers is inherent in our constitutional system. Congressional authority is basically limited to American territory, especially where noncitizens are involved,[21] while the executive power has its effects essentially abroad. We know of no controlling decision which holds or suggests that the mere existence of, or some action under, Congressional authority in a field of legislation precludes foreign affairs action by the Executive in the same field. In particular, this Court has declared repeatedly that the foreign commerce powers of Congress and the foreign relations powers of the President are not mutually exclusive and that there is a broad area in which the two overlap. *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 320; *Knauff* v. *Shaughnessy*, 338 U. S. 537, 542; *Chicago & Southern Air Lines* v. *Waterman S. S. Co.*, 333 U. S. 103, 109; *Fong Yue Ting* v. *United States*, 149 U. S. 698, 711–713.

2. The second ground relied upon by the court below in holding the Executive Agreement invalid

[21] *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 318; *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347, 357; *Foley Bros.* v. *Filardo*, 336 U. S. 281, 285; *United States* v. *Spelar*, 338 U. S. 217, 222; cf. *Steele* v. *Bulova Watch Co.*, 344 U. S. 280.

is that Congress, in Section 22 of the Agricultural Adjustment Act, has established an elaborate procedure of dealing with imports interfering with the price support program (*supra,* pp. 4–5) and that the President could not "avoid" compliance with these procedural requirements by recourse to his foreign relations powers (R. 168).[22] But there is no evidence that Congress intended to make Section 22 an exclusive procedure; on the contrary, there are persuasive indications that this type of legislation not only envisages, but gives congressional sanction to, the making of Executive Agreements.

Section 22 of the Agricultural Adjustment Act deals with a frequently recurrent problem in international relations. A foreign country may discriminate against the United States or flood our country with imports to the extent of undermining our economy, or of interfering with legislative programs, as in this case. There are two basic methods by which to cope with such disturbances. They are a diplomatic settlement through bilateral negotiation, or the invocation of unilateral retaliatory measures, such as recip-

[22] This argument, which is based to some extent on *Youngstown Co.* v. *Sawyer*, 343 U. S. 579, dealing with the internal powers of the President, disregards the essential difference between the President's powers in foreign and domestic affairs. *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 319, 321; and see the concurring opinions of Justices Frankfurter and Jackson in *Youngstown Co.* v. *Sawyer*, *supra*, at 597, 610, and fn. 2, at 635–636.

rocating discrimination or the imposition of burdens on imports like additional duties, import quotas, or even complete embargoes. The former method may be utilized by the President under his foreign relations powers alone; the latter often requires an act of Congress.[23]

In the face of the established understanding of both Congress and the President as to the interrelationship and coexistence of these two devices (cf. *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, 422; *United States* v. *Curtiss-Wright Corp.,* 299 U. S. 304, 327), the decision below holds that where Congress grants to the President retaliatory powers to deal with a specific import situation, it makes the exercise of this authority the exclusive method of settling the international problem and automatically terminates the Executive's power to adjust disputes of this type by way of negotiation. But the fact is that if the scope of such retaliatory legislation were limited to punishment, it would be doomed to failure, since the other country usually is able to impose equally onerous counter-reprisals.[24] Thus employed it would lead only to a gradual deterioration of foreign relations. It is

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[23] Cf. the discussion between Senator Millikin and Mr. Brown, Director of the Office of International Trade Policy, Department of State, on the extension of the Reciprocal Trade Agreements Act, Hearings before the Committee on Finance, United States Senate, 81st Cong., 1st Sess., on H. R. 1211, p. 844.

[24] Cf. R. 143 and Senator Tydings' remarks at 79 Cong. Rec. 11503.

for this reason that it has long been realized that the real function of this type of statute is to induce the other country to desist from its objectionable activities. *The Francis & Eliza*, 108 Fed. 541, 545 (E. D. La., 1820), reversed on other grounds, 8 Wheat. 398. This is a goal which cannot ordinarily be achieved by two independent legislatures without channels of communication, but only by way of negotiation between those branches of the governments which are equipped to deal directly with one another.[25] Hence, it has been understood by the Congress and by the Executive for at least three-quarters of a century that retaliatory powers are granted to the President primarily to strengthen his position at the conference table, and that their use is to be secondary after attempts at amicable settlement have failed.[26]

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[25] Cf. *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 320. Recalling the unfortunate experience under the Articles of Confederation (Art. IX) which vested the treaty-making power in Congress, the Federalist (Nos. 64 and 75) points out that the executive is the most fit agent to conduct negotiations.

[26] The decisions of this Court discussing retaliatory commercial legislation fully recognize that the intent of these statutes is to strengthen, not to abrogate, the foreign relations power. *Field* v. *Clark*, 143 U. S. 649, 682–694, especially at 691; *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 421–430, especially at 422; *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 322–329, especially at 327.

Cf. Annual Message of President Grant, December 5, 1870, Foreign Relations of the United States, 1870, pp. 11–13, and President Theodore Roosevelt's advice to talk softly while carrying a big stick in reserve.

Section 3 of the Tariff Act of 1890 (26 Stat. 612) is the leading instance of retaliatory legislation which served as the basis for the conclusion of executive agreements in the commercial field. This provision, held constitutional in *Field* v. *Clark*, 143 U. S. 649, 680–691, authorized the President, if he found that a country imposed unequal or unreasonable duties upon certain articles imported from the United States, to suspend the duty-free importation of those goods from such a country into the United States.[27] This section was utilized as the bargaining basis for at least twelve reciprocal trade agreements with the same objectives as the Act (Sen. Exec. Doc. 119, 52d Cong., 1st Sess., p. 2). Subsequent Congressional discussion disclosed that both political parties fully approved of this use of the President's foreign relations power (26 Cong. Rec. 6981–7000). It was even suggested on the floor of the Senate that the grant to the President of retaliatory powers in Section 3 carried with it direct authority to eliminate discrimination by way of negotiation (26 Cong. Rec. 6991).[28] And Section 71 of the Tariff

[27] A similar retaliatory clause was found in Section 5 of the Meat Inspection Act of 1890, 26 Stat. 414, 415.

[28] While at least one Senator disagreed with this broad interpretation of the clause (26 Cong. Rec. 6991), no one suggested that the grant of retaliatory powers negatived the power to negotiate Executive Agreements. It should be noted that Congress had refused to include in the Tariff Act of 1890 a provision expressly authorizing the making of reciprocal trade agreements (cf. statement of Senator Gray at 26 Cong. Rec. 6987).

Act of 1894 (28 Stat. 569), which repealed Section 3 of the Tariff Act of 1890, contained an express provision saving the reciprocal arrangements entered into under Section 3. The practice with respect to later statutes authorizing retaliatory measures has been similar; Executive Agreements have often been made, both under and apart from specific authorization, in order to effectuate the general statutory policy. See McClure, *International Executive Agreements* (1941), pp. 84–92, 173 ff.[29]

The legislative and post-legislative history of Section 22 [30] discloses that Congress was aware of the practice that statutes of this type are intended to support rather than to curb the President's foreign relations powers. During the discussion which preceded its enactment, Congress was informed (79 Cong. Rec. 11503) that the President

[29] Examples of these statutes are: Tariff Act of 1909, Section 2, 36 Stat. 82; Tariff Act of 1922, Section 317, 42 Stat. 944; Tariff Act of 1930, Section 338, 46 Stat. 704, 19 U. S. C. 1338. The latter provision is still in effect. Under the Reciprocal Trade Act (48 Stat. 943, 19 U. S. C. 1351–1354), the power of retaliation has also been utilized as a basis for negotiation rather than for unilateral action. Cf. *Policy of United States Concerning Generalization of Tariff Concessions*, 12 Department of State Press Release 212, 214, 219. The Anti-dumping Act of 1921, 42 Stat. 11, 19 U. S. C. 160–171, and Section 303 of the Tariff Act of 1930, 46 Stat. 687, 19 U. S. C. 1303, raise similar problems. See also 19 U. S. C. 130, 131, 46 U. S. C. 141, 142 (tonnage duties).

[30] Section 22 was inserted into the Agricultural Adjustment Act by Section 31 of the Act of August 24, 1935, 49 Stat. 773.

had utilized the analogous provision of Section 3 (e) of the National Industrial Recovery Act as the basis of negotiations under which Japan, as in the instant case Canada, agreed to limit its export of matches to the United States (see *Foreign Relations of the United States, 1934,* Vol. III, pp. 801–805).[21]

Moreover, Section 22 (f), as originally enacted by the Agricultural Act of 1948 (*infra,* p. 30) and as it was in effect on November 23, 1948, provided that the administrative mechanism of Section 22 was not to be enforced "in contravention of any treaty *or other international agreement* to which the United States is or *hereafter* becomes a party" [emphasis added]. Congress thereby assumed that the President had authority to negotiate agreements *in conflict* with the very policy of Section 22 and expressly declared that such contravening agreements would take precedence over the statutory policy. It would be incongruous to suppose that Congress recognized the President's authority to depart from the policy of Section 22 by way of Executive Agreement

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[21] The possible argument that Section 22 is couched in mandatory language ("the President shall") and, hence, that the President has to follow the statutory procedure once its conditions have been met, and is not at liberty to follow another method of reaching the same result, is in conflict with the legislative history of Section 22. Cf. 79 Cong. Rec. 9591–9592 (rejection of amendment to make Section 22 mandatory); 79 Cong. Rec. 11497–11526 (constant reference to intent to delegate discretionary powers to President).

but denied him the use of that method when he sought to carry out the spirit and purpose of the statute. In 1950 and 1951, Section 22 (f) was amended to limit the President's power to enter into agreements *inconsistent* with the purposes of Section 22.[32] But although Congress has been advised of the potato agreement with Canada (Extension of Reciprocal Trade Agreements Act, Hearings before the Committee on Finance, United States Senate, 81st Cong., 1st Sess., pp. 898–899, 918–921), and has three times reexamined Section 22 (Acts of June 28, 1950, Sec. 3, 64 Stat. 261; and June 16, 1951, Sec. 8 (b), 65 Stat. 75, and August 7, 1953, Section 104, 67 Stat. 472), it has never taken any steps to deny the President the power to carry out the policy of that Section through bilateral negotiation. This history seems clearly to indicate that Congress has not forbidden agreements harmonious with the aims of the statute; and there can be no doubt (and neither respondent nor the Fourth Circuit have denied) that the Executive Agreement in this case was fully compatible with the policy and objectives of Section 22.

3. Finally, the Court of Appeals, while conceding that the United States was the beneficiary of a contract for the benefit of a third party and

[32] See S. Rep. No. 1375, 81st Cong., 2d Sess., p. 4; H. Rep. No. 2269 (conference report), 81st Cong., 2d Sess., p. 5; S. Rep. No. 299, 82d Cong., 1st Sess., p. 7; H. Rep. No. 537 (Conference Report), 82d Cong., 1st Sess., p. 4.

that it suffered tangible damage from respondent's breach (R. 166, 169), held that no action can be maintained on this contract, in the absence of express authorization by Congress, even if the Executive Agreement is valid (R. 169–170). This argument disregards the well-settled rule that no specific authorization is required for the judicial enforcement of a contractual right of the United States. *Dugan* v. *United States*, 3 Wheat. 172, 181; cf. *Cotton* v. *United States*, 11 How. 229, 231–232; *United States ex rel. Marcus* v. *Hess*, 317 U. S. 537, 550.[33]

United States v. *Standard Oil Co. of California*, 332 U. S. 301, relied upon by the court below (R. 169–170), does not hold to the contrary. The question presented in that case was whether the Court should expand, by way of analogy, the tortfeasor's liability to an employer for loss of his injured employee's services to a situation to which it had not applied before—the relationship between the United States and its military personnel. The Court refused to create what it considered to be

[33] If the court below believed that this rule, while applicable to situations where the United States acts in a "proprietary" capacity, does not govern contracts entered into in the "governmental" sphere (cf. R. 169), it overlooked the principle that every activity of the United States is governmental. *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466, 477; *Federal Land Bank* v. *Bismarck Lumber Co.*, 314 U. S. 95, 102; *Cotton* v. *United States*, 11 How. 229; cf. *United States ex rel. Marcus* v. *Hess*, 317 U. S. 537, 550; *United States* v. *Standard Oil Co. of California*, 332 U. S. 301, 315.

a new cause of action *in consimili casu* without congressional sanction; it pointed out, however (at 315), that no statutory authorization was required where the United States merely seeks to enforce a traditional remedy. Here, the United States asks enforcement of a recognized contractual right—third-party beneficiary liability—not the creation of a new remedy.

On this point, the decision below is opposed to the principles laid down by the Court of Appeals for the Third Circuit in *United States* v. *LeRoy Dyal Co.*, 186 F. 2d 460, certiorari denied, 341 U. S. 926. That case involved the breach of a contract entered into, in connection with an earlier potato price support program, between the Commodity Credit Corporation and a potato dealer in which the latter agreed not to purchase potatoes from a farmer who was not an eligible dealer. While the main issue was whether a liquidated damage clause was enforceable or constituted a penalty, the court had no difficulty in finding that the defendant was "liable according to his agreement for breaking a contract voluntarily entered into" (186 F. 2d 464), and in judicially enforcing that liability. Unlike the court below, the Third Circuit affirms the Government's right to take advantage of contractual stipulations to carry out its programs. And as appears from the *LeRoy Dyal* case, the Agricultural Adjustment program has been largely enforced by way of contractual

agreements, and there are other existing and potential projects in the same class.[24]

CONCLUSION

For the above reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

ROBERT L. STERN,
Acting Solicitor General.

SEPTEMBER 1953.

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[24] The decision below is in direct conflict with the unreported decision of the United States District Court for the Eastern District of New York in *United States v. Carpenter* (*infra*, Appendix B, pp. 32–38), where, in a situation virtually identical with the one at bar, the District Court upheld a complaint against an importer of potatoes and granted a preliminary injunction prohibiting the sale of imported seed potatoes for table purposes. That court refused to pass on the Executive Agreement, holding that, whether or not it was valid, the importer had validly contracted with his Canadian exporter not to sell or use the potatoes for seed purposes, and the United States could take the benefit of that agreement.

APPENDIX A

Constitutional and Statutory Provisions Involved

(a) *Constitution.*

Art. I. Section 10, pars. 1 and 3. provide in pertinent part:

> Section 10. No State shall enter into any Treaty Alliance, or Confederation; * * *.
>
> No State shall without the Consent of Congress * * * enter into any Agreement or Compact with another State, or with a foreign power * * *.

Art. II. Section 2 provides in pertinent part:

> * * * * *
>
> He [the President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; * * *.

(b) Section 22 of the Agricultural Adjustment Act as amended by Section 3 of the Agricultural Act of 1948 (62 Stat. 1249, 7 U. S. C. 624) provided in November 1948:

> Sec. 22. (a) Whenever the President has reason to believe that any article or articles are being or are practically certain to be imported into the United States under such conditions and in such quantities as to render or tend to render ineffective, or materially interfere with, any program or operation undertaken under this title or the Soil Conservation and Domestic Allotment Act, as amended, or section 32, Pub-

lic Law Numbered 320, Seventy-fourth Congress, approved August 24, 1935, as amended, or any loan, purchase, or other program or operation undertaken by the Department of Agriculture, or any agency operating under its direction, with respect to any agricultural commodity or product thereof, or to reduce substantially the amount of any product processed in the United States from any agricultural commodity or product thereof with respect to which any such program or operation is being undertaken, he shall cause an immediate investigation to be made by the United States Tariff Commission, which shall give precedence to investigations under this section to determine such facts. Such investigation shall be made after due notice and opportunity for hearing to interested parties, and shall be conducted subject to such regulations as the President shall specify.

(b) If, on the basis of such investigation and report to him of findings and recommendations made in connection therewith, the President finds the existence of such facts, he shall by proclamation impose such fees not in excess of 50 per centum ad valorem or such quantitative limitations on any article or articles which may be entered, or withdrawn from warehouse, for consumption as he finds and declares shown by such investigation to be necessary in order that the entry of such article or articles will not render or tend to render ineffective, or materially interfere with, any program or operation referred to in subsection (a), of this section, or reduce substantially the amount of any product processed in the United States from any

such agricultural commodity or product thereof with respect to which any such program or operation is being undertaken: *Provided*, That no proclamation under this section shall impose any limitation on the total quantity of any article or articles which may be entered, or withdrawn from warehouse, for consumption which reduces such permissible total quantity to proportionately less than 50 per centum of the total quantity of such article or articles which was entered, or withdrawn from warehouse, for consumption during a representative period as determined by the President: *And provided further*, That in designating any article or articles, the President may describe them by physical qualities, value, use, or upon such other bases as he shall determine.

(c) The fees and limitations imposed by the President by proclamation under this section and any revocation, suspension, or modification thereof, shall become effective on such date as shall be therein specified, and such fees shall be treated for administrative purposes and for the purposes of section 32 of Public Law Numbered 320, Seventy-fourth Congress, approved August 24, 1935, as amended, as duties imposed by the Tariff Act of 1930, but such fees shall not be considered as duties for the purpose of granting any preferential concession under any international obligation of the United States.

(d) After investigation, report, finding, and declaration in the manner provided in the case of a proclamation issued pursuant to subsection (b) of this section, any proclamation or provision of such proclamation may be suspended or terminated by the

President whenever he finds and proclaims that the circumstances requiring the proclamation or provision thereof no longer exist or may be modified by the President whenever he finds and proclaims that changed circumstances require such modification to carry out the purposes of this section.

(e) Any decision of the President as to facts under this section shall be final.

(f) No proclamation under this section shall be enforced in contravention of any treaty or other international agreement to which the United States is or hereafter becomes a party.

(c) Section 1 (b) of the Agricultural Act of 1948 (62 Stat. 1247) provides:

SECTION 1. Notwithstanding any other provision of law, the Secretary of Agriculture is authorized and directed through any instrumentality or agency within or under the direction of the Department of Agriculture, by loans, purchases, or other operations * * *.

* * * * *

(b) To support until January 1, 1950, a price to producers of commodities with respect to which the Secretary of Agriculture by public announcement pursuant to the provisions of the Act of July 1, 1941, as amended, requested an expansion of production of not less than 60 per centum of the parity or comparable price therefor nor more than the level at which such commodity was supported in 1948, except that Irish potatoes harvested before January 1, 1949, milk and its products, hogs, chickens, and eggs shall be supported at 90 per

centum of the parity or comparable price. The comparable price for any such commodity shall be determined and used by the Secretary for the purposes of this subsection if the production or consumption of such commodity has so changed in extent or character since the base period as to result in a price out of line with parity prices for the commodities referred to in (a) hereof. In carrying out the provisions of this subsection the Secretary of Agriculture shall have the authority to require compliance with production goals and marketing regulations as a condition to eligibility of producers for price support.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
Civ. 9799, May 13, 1949

UNITED STATES OF AMERICA, PLAINTIFF

v.

ANTHONY C. CARPENTER, DEFENDANT

KENNEDY, J.

Two motions are involved here. One by the plaintiff is for a preliminary injunction (a temporary restraining order has been issued). The second by the defendant is for an order dismissing the complaint on the ground that it fails to state a claim of any kind.

The complaint alleges that Carpenter is a potato dealer in business at Water Mill, Long Island, New York. Under the Agricultural Act of 1948 (Ch. 827, P. L. 897, 80th Cong.) the United States Department of Agriculture is charged with the duty of supporting the price of certain agricultural commodities, including Irish potatoes. Pursuant to that act and predecessor legislation, the department has for some years purchased, and now continues to purchase, all eligible Irish potatoes offered by an eligible vender. The supporting price is $3.45 per 100 pounds.

On November 23, 1948, according to the complaint, the United States discovered that large quantities of potatoes harvested in Canada were

being exported to the United States. Some time prior to November 23, 1948, discussions were carried on between the American State Department and the Canadian Ambassador. The result of these discussions was an exchange of notes, in the course of which the Canadian government announced that it would agree to require permits for Irish potatoes and to withhold permits for all table stock potatoes. Moreover, the United States was assured by the Canadian government that no export permits would be granted to Canadian growers, unless the export contract included the clause under which the importer gave an assurance that the potatoes would not be converted or reassigned for table stock purposes.

Between October 1948 and January 1949, the defendant Carpenter purchased more than 65 carloads of Canadian certified Irish seed potatoes. In each case there was included in the contract with the Canadian exporter the assurance that "these potatoes will be used for seed purposes only."

The complaint also alleges that the "defendant's agreement to use the seed potatoes imported from Canada for seed purposes only was made for the benefit of the United States," and that the defendant has violated these contracts made with the Canadian exporters in that he has made repeated sales of large quantities of the potatoes for table stock purposes, and has threatened to make other such sales. It is alleged that the United States has already been damaged to the extent of $9,000 by Carpenter's violations of his contracts with the Canadian exporters. The prayer for relief is that Carpenter be enjoined from further

sales of the potatoes for table stock, and also that money damages be awarded to the plaintiff, United States.

In support of his opposition to the issuance of an injunction and also in support of his motion to dismiss the complaint, the defendant alleges that the executive agreement between the Canadian and the American governments, evidenced by the exchange of notes, is void. It is pointed out that under the Agricultural Act of 1948 (7 U. S. C. A. § 624 (b)) and the Tariff Act of 1930, as amended (19 U. S. C. A. § 1354, 1357–1359), there are certain restrictions against and conditions upon executive proclamations which limit the total quantity of any article that may be entered into the United States. Notably, these limitations and conditions are to be found in section 22 (a) of the Agricultural Act of 1948 (7 U. S. C. A. § 624 (b)). The government asserts that these limitations are not applicable to the type of agreement outlined above. Concededly, the exchange of notes of November 23, 1948, was not preceded by some of the statutory conditions, i. e., hearings, and in general the agreement was not made in compliance with the statutes mentioned. And the defendant urges that the section 22 (a) of the Agricultural Act (7 U. S. C. A. § 624 (b)) squarely covers any executive action restricting the importation of Canadian potatoes.

As I understand the argument of the government, it is to the effect that even if the statutory limitations might otherwise be applicable, this is the kind of executive agreement which is within the competence of the United States government to make regardless of the attitude of the legisla-

tive branch (citing *U. S.* v. *Curtiss-Wright Export Corp.*, 1936, 299 U. S. 304, 318; *U. S.* v. *Belmont*, 1937, 301 U. S. 324, 330, 331; *U. S.* v. *Pink*, 1942, 315 U. S. 203, 228–230). In reply, defendant says that these cases apply only to the regulation of external or foreign affairs and that the agreement mentioned in the complaint at bar is in fact an attempt to regulate the internal economy of the United States.

But I do not think it is necessary for me, in the disposition of the motions, to decide whether the so-called executive agreement is valid.

It is conceded by the defendant that he has violated the agreement between himself and the Canadian exporters. He furnished an assurance that he would not sell the potatoes covered by his contracts for table stock purposes, yet he did that very thing.[1]

Palpably, the plaintiff United States of America, has sustained damage as a result of the defendant's action, because it has been supporting, and continues to support, the price of table stock potatoes. And in the last analysis, the defendant is unjustly enriched by a subsidy intended not for the benefit of Canadian growers but for the benefit of the American farmers.

The only real question tendered by the motion to dismiss the complaint, therefore, is whether the plaintiff United States of America is entitled to assert and enforce rights growing out of the con-

[1] There is in the papers an admission in writing by the defendant which eliminates any question or doubt about his violation of the contracts. Indeed it was intimated on the argument that the action of the defendant was deliberately taken in order to test out the rights of the parties.

tracts between the defendant and the Canadian growers. Viewed in this light, the validity of the executive agreement is actually not in issue: that agreement is not truly the subject of the controversy, but merely a fact relevant to the controversy. To state it in another way, it is quite conceivable that the Canadian government, as a matter of comity, might, without an agreement, exact from its own nationals an undertaking that every export contract relating to potatoes should contain an assurance by the importer that he would do nothing to disrupt the American system of price support. Whether the United States was the beneficiary of such self-imposed limitations by a foreign government would turn simply on the question whether the foreign government (and through it the exporters) *intended* that such limitations should enure to the benefit of the price supporting system for which the American government was paying. The agreement in the case at bar is relevant to the question of intent.

The complaint alleges that the contracts between the defendant and the Canadian exporters were in fact made for the benefit of the United States of America, at least to the extent that they contain the resale limitation referred to. On familiar principles, if this is truly a question of fact, the motion to dismiss the complaint would necessarily be denied, even though in the first instance the Canadian exporters were led to embody the limitation in their contracts by an executive agreement invalid under the laws of the United States—at least so long as the agreement was not infected by fraud or other circumstances, which would infect everything connected with it.

Some of the contracts between the defendant and the Canadian exporters were made in New York. If one assumes that a trier of the facts made a finding that the export contracts were for the benefit of the United States, and were breached, then there would only remain the law question whether the United States as a third party could maintain the action. I believe that both under federal law and under New York law a beneficiary of such agreements is entitled to maintain suit (*German Alliance Ins. Co.* v. *Home Water Supply Company*, 1912, 226 U. S. 220; *Constable* v. *National Steamship Co.*, 1893, 154 U. S. 51; *In re United Cigar Stores Co.*, 1934, 2 Cir., 70 F. 2d 313; *Regney* v. *New York Cent. & H. R. R. Co.*, 1916, 217 N. Y. 31; *Coley* v. *Cohen*, 1942, 289 N. Y. 365).

If I am right in all this, it follows that the motion to dismiss the complaint must be denied.

The type of preliminary injunction which ought issue (if any) presents a difficult question. It is perfectly clear to me that the plaintiff is entitled during the pendency of the action to an order restraining the defendant against the future violation of Canadian expert contracts. In other words, until the case has been tried, the defendant ought not to be allowed to purchase potatoes in Canada for seed purposes or to take deliveries and resell them in the United States as table stock. But the defendant has on hand a quantity of Canadian potatoes, which, according to the papers, are useless for seed. They are, however, eligible for sale as table stock. Were the preliminary injunction to cover not only future Canadian purchases and deliveries but also such po-

tatoes on hand, those which the defendant now has would undoubtedly spoil before a trial could be had. Then, should it turn out that the plaintiff was not entitled to the relief which it seeks, the harm to the defendant would be irreparable. The plaintiff, I should think would be, to some extent, protected in this phase of the controversy were the defendant to furnish a bond in a penal sum to be agreed upon by the parties or fixed by the court, which would make the plaintiff whole, if it eventually succeeded in the litigation, at least so far as sales of stock useless for seed and presently in the defendant's hands are concerned and so far as money damages are involved. Such an order, it seems to me, would satisfy the requirement of the cases that I must balance conveniences (*Forstmann* v. *Joray Holding Co.*, 1926, 244 N. Y. 25; *Yakus v. U. S.*, 1944, 321 U. S. 414, 440, 441; *International F. Co.* v. *Associated Producers*, S. D. N. Y., 1921, 273 F. 585, 588).

The motion for a preliminary injunction is granted as indicated. Settle order on notice.

(S) Harold M. Kennedy,
HAROLD M. KENNEDY,
United States District Judge.

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No. 14

In the Supreme Court of the United States

OCTOBER TERM, 1954

UNITED STATES OF AMERICA, PETITIONER

v.

GUY W. CAPPS, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

SIMON E. SOBELOFF,
Solicitor General,

J. LEE RANKIN,
WARREN E. BURGER,
Assistant Attorneys General,

OSCAR H. DAVIS,
Special Assistant to the Attorney General,

PAUL A. SWEENEY,
HERMAN MARCUSE,
MARCUS A. ROWDEN,

Attorneys,
Department of Justice,
Washington 25, D. C.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Constitutional provisions and statutes involved	3
Statement:	
1. The Potato Price Support Program and the Executive Agreement between the United States and Canada	3
2. Respondent's Potato Imports	6
3. The Proceedings Below	9
Summary of Argument	11
Argument:	
I. The President had authority to enter into the Potato Agreement with Canada	17
A. The Potato Agreement is sanctioned by the Agricultural Adjustment Act and conflicts with no statute	19
B. The President has general power to enter into Executive Agreements of the type of the Potato Agreement	31
1. The plenary foreign relations power of the United States	32
2. The President's role in the conduct of foreign affairs	35
3. The Treaty Clause and executive agreements	39
4. Import restriction agreements like the Potato Agreement	50
II. The United States is a third party beneficiary of the contract made under the Potato Agreement by respondent and the Canadian exporter, and may recover the damages it suffered as a result of the breach of this contract	58
A. The United States may enforce the potato subsidy program through contracts for the benefit of itself as third party	58

Argument—Continued

Page

B. Respondent made an enforceable promise for the benefit of the United States, which has been breached to the Government's damage..... 63

1. Respondent made a promise for the benefit of the United States 64

2. The Court of Appeals properly held that, assuming the enforceability of respondent's promise, the United States sufficiently proved a breach of contract and the resulting damages 69

Conclusion 75

Appendix A—Constitutional and Statutory Provisions. 76

Appendix B—Executive Agreements Differing From Legislation on Foreign Commerce..... 81

CITATIONS

Cases:

Allison v. *Chandler*, 11 Mich. 542..... 74

Altman & Co. v. *United States*, 224 U.S. 583..... 47, 48

American Banana Co. v. United Fruit Co., 213 U.S. 347 55

American Surety Co. v. *Smith*, 100 Fla. 1012..... 68

Bernstein v. *Van Heyghen Freres S.A.*, 163 F. 2d 246, certiorari denied, 332 U.S. 772..... 39

Bigelow v. *RKO Radio Pictures*, 327 U.S. 251.... 74

Bruce Construction Co. v. *Federal Realty Co.*, 104 Fla. 93 68

Bucher v. *Krause*, 200 F. 2d 576..... 74

Burnet v. *Brooks*, 288 U.S. 378..... 35

Carter v. *Carter Coal Co.*, 298 U.S. 228..... 33

Chae Chan Ping v. *United States*, 130 U.S. 581.... 35

Cherry Lake, Inc. v. *Kearce*, 157 Fla. 484..... 68

Chicago & Southern Air Lines v. *Waterman Corp.*, 333 U.S. 103 ..... 15, 39, 55, 56

Chisholm v. *Georgia*, 2 Dall. 419 34

Clearfield Trust Co. v. *United States*, 318 U.S. 363.. 60, 67

Cases—Continued

Page

Comstock v. *Group of Institutional Investors*, 335 U.S. 211 65
Cotton v. *United States*, 11 How. 229..... 16, 59, 60
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Etlimar S.A. v. *United States*, 123 C. Cls. 552..... 48
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Federal Land Bank v. *Bismarck Lumber Co.*, 314 U.S. 95 60
Field v. *Clark*, 143 U.S. 649..... 24, 26, 47
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Fong Yue Ting v. *United States*, 149 U.S. 698..35, 48, 57
The Francis and Eliza, 108 Fed. 541, reversed on other grounds, 8 Wheat. 458..... 21
General Finance Corp. v. *Dillon*, 172 F. 2d 924.... 73
German Alliance Insurance Co. v. *Home Water Co.*, 226 U.S. 220..... 68
Girard Trust Co. v. *United States*, 149 F. 2d 872, 161 F. 2d 159 67
Graves v. *New York ex rel. O'Keefe*, 306 U.S. 466.. 60
Hendrick v. *Lindsay*, 93 U.S. 143..... 67
Hickman v. *Jones*, 9 Wall. 197..... 70
Holmes v. *Jennison*, 14 Pet. 540..... 42
Hopkins v. *E. I. DuPont de Nemours Co.*, 199 F. 2d 930 70
Horney v. *Mason*, 184 Va. 253..... 68
Inland Waterways v. *Young*, 309 U.S. 517..... 47
Jones v. *United States*, 137 U.S. 202..... 35
Knauff v. *Shaughnessy*, 338 U.S. 537..... 39, 56
Knox v. *Lee*, 12 Wall. 457 34
Latvian State Cargo and Passenger Steamship Line v. *McGrath*, 188 F. 2d 1000, certiorari denied, 342 U.S. 816..... 39
Mackenzie v. *Hare*, 239 U.S. 299..... 35
Maret, The, 145 F. 2d 431..... 39
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Monaco v. *Mississippi*, 292 U.S. 313..... 46, 48
Montague Mfg. Co. v. *Homes Corp.*, 142 Va. 301.. 68
Moot v. *Gibson*, 21 Ont. Rep. 248..... 65
Moser v. *United States*, 341 U.S. 41..... 48

Cases—Continued

Page

National Labor Relations Board v. *Pittsburgh S.S. Co.*, 340 U.S. 498 70
National Metropolitan Bank v. *United States*, 323 U.S. 454 67
Nishimura Ekiu v. *United States*, 142 U.S. 651 .... 35, 54
Ozanic v. *United States*, 188 F. 2d 228 48
Palmer v. *Connecticut Railway Co.*, 311 U.S. 544 .. 73, 75
Panama Refining Co. v. *Ryan*, 293 U.S. 388 26
Penhallow v. *Doane*, 3 Dall. 54 ..... 33, 34
Pritchard v. *Norton*, 106 U.S. 124 67
Quirin, Ex parte, 317 U.S. 1 47
Respublica v. *De Longchamps*, 1 Dall. 110 (Oyer & Terminer, Philadelphia, 1784) 42
The Resolution, 2 Dall. 1 (Federal Court of Appeals) (1781) 42
Robins Dry Dock & Repair Co. v. *Flint*, 275 U.S. 303 68
Scott v. *Chicago, Rock Island & Pacific R. Co.*, 197 F. 2d 259 69
Springer v. *Philippine Island*, 277 U.S. 189 57
Steele v. *Bulova Watch Co.*, 344 U.S. 280 55
Story Parchment Co. v. *Patterson Co.*, 282 U.S. 555 73
United States v. *Allegheny County*, 322 U.S. 174 ... 67
United States v. *Belmont*, 301 U.S. 324 .. 38, 46, 48, 49, 55
United States v. *Bradley*, 10 Pet. 343 63
United States v. *Butler*, 297 U.S. 1 33
United States v. *Carpenter*, 113 F. Supp. 327 62
United States v. *Curtiss-Wright Corp.*, 299 U.S. 304 ..... 14, 22, 26, 33, 34, 35, 38, 48, 49, 55, 56
United States v. *Gilman*, 347 U.S. 501 ..... 16, 61
United States v. *Hodson*, 10 Wall. 395 63
United States v. *LeRoy Dyal Corp.*, 186 F. 2d 460, certiorari den., 341 U.S. 926 62
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United States v. *Midwest Oil Co.*, 236 U.S. 459 47
United States v. *Moorman*, 338 U.S. 457 63
United States v. *National Exchange Bank*, 214 U.S. 302 60
United States v. *North Carolina*, 136 U.S. 211 67
United States v. *Pink*, 315 U.S. 203, 33, 38, 46, 48, 49, 55, 56

Cases—Continued

	Page
United States v. *Tingey*, 5 Pet. 115	63
United States v. *Spelar*, 338 U.S. 217	55
United States v. *Standard Oil Co. of California*, 332 U.S. 301	16, 59, 61, 67
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Watts v. *United States*, 1 Wash. Ter. 288	40
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Woolworth Co. v. *Contemporary Arts*, 344 U.S. 228	74
Youngstown Co. v. *Sawyer*, 343 U.S. 579	33, 57

Statutes:

Articles of Confederation	35
Art. IX	35
Art. VII	35
Art. VIII	36
Constitution of the United States:	
Art. I:	
Sec. 3	49
Sec. 8, par. 3	76
Sec. 10	14, 76
Art. II	32
Sec. 2	32, 39, 76
Sec. 3	46
Fifth Amendment	49
Bill of Rights	49
Act of April 18, 1818, 3 Stat. 432	22
Act of May 6, 1822, 3 Stat. 681	22
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Sec. 3	28
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Sec. 8(b)	28

Statutes—Continued

	Page
Agricultural Act of 1948 (62 Stat. 1247)	3
Sec. 1(b)	3, 80
Sec. 3	4, 76
Agricultural Adjustment Act of 1948	4, 76
Sec. 22	4, 12, 13, 18, 26, 50, 51
Sec. 22(f)	13, 30, 51
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Sec. 5	24
National Industrial Recovery Act	27
Sec. 3(e)	27
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Sec. 26	44, 53
Reciprocal Trade Agreements Act (48 Stat. 943, 19 U.S.C. 1351-1354)	25, 28
Tariff Act of 1890 (26 Stat. 612):	
Sec. 3	12, 23, 26
Tariff Act of 1894 (28 Stat. 569):	
Sec. 71	24
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Sec. 2	25
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Sec. 317	25
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Sec. 303	6, 25, 51
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Sec. 350	47
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Statutes—Continued

Page

Miscellaneous:

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Vol. 5, pp. 81-90 22
Vol. 6, pp. 963-985..... 22
Vol. 6, pp. 963-988..... 23
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Cols. 463-464, 496..... 37
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Cols. 230-236, 238-241..... 44
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pp. 299-313 52
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Secs. 22-36; 143-162 34
p. 262 41
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79 Cong. Rec. 11497-11512, 11521-11526..... 27
79 Cong. Rec. 11503 ..... 21, 27
79 Cong. Rec. 11521-11526 27

Miscellaneous—Continued

	Page
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p. 385	27
p. 744	28
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Miscellaneous—Continued

Page

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Rule 1 66
Rule 2 66
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p. 685 ..... 49, 53
p. 694 53
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pp. 392-397 39
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p. 844 20
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Miscellaneous—Continued

	Page
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Miscellaneous—Continued

Page

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pp. 385, 390-392 45
pp. 385, 403-408 46

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Sec. 325 66
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Sec. 64 66
Sec. 147 68
Sec. 358 67

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Page

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p. 11 53
pp. 13-14 53
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pp. 37-38, 44-45, 116-118 34
p. 47 35
p. 121 49
p. 150 54
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Miscellaneous—Continued

Page

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 14

UNITED STATES OF AMERICA, PETITIONER

v.

GUY W. CAPPS, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The memorandum opinion of the United States District Court for the Eastern District of Virginia denying defendant's motion to dismiss the complaint (R. 13-16) is reported at 100 F. Supp. 30. The oral opinion of the District Court granting defendant's motion for a directed verdict at the end of the plaintiff's evidence (R. 147-149) has not been reported. The opinion of the United States Court of Appeals for the Fourth Circuit (R. 164-170) is reported at 204 F. 2d 655.

JURISDICTION

The judgment of the Court of Appeals was entered on April 15, 1953 (R. 170). On July 10, 1953, Mr. Justice Clark extended the time within which the petition for a writ of certiorari might be filed to and including September 12, 1953 (R. 173). The petition for a writ of certiorari was filed on September 10, 1953, and was granted on November 16, 1953 (R. 175). The jurisdiction of this Court rests on 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Whether Section 22 of the Agricultural Adjustment Act limited the Executive to that Section's specific procedural and substantive remedies against damaging imports of subsidized commodities, and precluded the Executive from exercising his authority to enter into Executive Agreements to attain the same ends as the remedies provided in Section 22.

2. Whether the President has general nonstatutory power to enter into an Executive Agreement with a foreign country in order to aid and implement a Congressional policy regulating commerce.

3. Whether, where the Federal Government as regulator of foreign trade is the beneficiary of a third-party beneficiary contract, judicial enforcement of the promise requires specific Congressional authorization.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent provisions of the Constitution and of the statutes involved are set forth in Appendix A, *infra*, pp. 76-81.

STATEMENT

1. *The Potato Price Support Program and the Executive Agreement between the United States and Canada.* Under Section 1(b) of the Agricultural Act of 1948 (*infra*, pp. 80-81), the United States undertook to support potatoes at 90 per cent of the parity price. This program was carried out by means of contracts in which the United States, acting through the Commodity Credit Corporation, agreed to purchase from eligible growers and dealers all potatoes that could not be sold commercially at 90 per cent of the parity price (R. 164 and 6 C. F. R. (1949 ed.) 648.51-65).[1]

The 1948 potato crop was one of the largest recorded in the United States as well as in the Maritime Provinces of Canada (R. 73). Since the Canadian unsupported price levels were considerably lower than those in the United States,[2] it became profitable to import Canadian potatoes into the United States in spite of custom and freight

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[1] The parity prices varied from State to State and increased from July 1948 to March-April 1949. The lowest parity price was $2.15 for July 1948 in North Dakota and Minnesota, the highest $3.50 for March-April for the mid-Atlantic States. 6 C. F. R. 648.64. See also R. 87-88.

[2] In the instant case, the price per cwt, was $1.82 at Charlottetown, P. E. I., in December 1948 (R. 150-151). Ninety per cent of parity for Maine potatoes at the same time was $2.70 (6 C. F. R. 648.64).

charges.[3] On the other hand, the influx of Canadian potatoes was bound to decrease the quantity of domestic potatoes which could be sold in the open market at 90 per cent of parity, thus materially increasing the cost of the price support program to the Government.

Congress anticipated that imports might interfere substantially with price support programs. Section 22 of the Agricultural Adjustment Act, as amended by Section 3 of the Agricultural Act of 1948 (*infra*, pp. 76-79), contains a method for dealing with the problem. It provides for a direction by the President to the Tariff Commission to investigate the situation, an investigation by the Tariff Commission after due notice and opportunity for hearing to interested parties, a report by the Tariff Commission containing findings and recommendations, findings of fact by the President on the basis of the report, and finally imposition on the objectionable imports of fees not to exceed 50 per centum *ad valorem* or of quantitative limitations.

Two considerations made it inadvisable to apply Section 22 to the potato situation. While suited to work out a long-range agricultural program, Section 22 was too complicated and slow to cope with the temporary problems caused by the sudden bumper crop of a perishable commodity. In 1948

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[3] Custom duties amounted to $0.75 per cwt. (R. 76), freight from Prince Edward Island to Florida $0.40 per cwt. (R. 77, 158).

the customary time for the Tariff Commission to act was 9-10 months. 94 Cong. 8450.[4] Moreover, it was likely that the imposition of the additional fees or import limitations by unilateral action would result in retaliation by Canada, one of our best customers for fruits and vegetables (R. 143).

In these circumstances, the President did not avail himself of the machinery set forth in Section 22, but rather sought to accomplish the purposes of the Section by a more appropriate method. The mutual problems caused by the large potato surplus were solved, not by independent use of national legislation, but by way of bilateral negotiation between the United States and Canada. In the resulting agreement, signed on November 23, 1948 (R. 152-155), Canada undertook to place potatoes under export control, not to issue licenses for the exportation of the table stock potatoes to the United States, and to grant export licenses for certified seed potatoes to the United States only if the con-

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[4] It was said that there was too little time left before the presidential conventions of 1948 to improve on the procedures of Section 22 (94 Cong. Rec. 8450-8451). See, however, Section 104 of the Trade Agreements Extension Act of 1953, 67 Stat. 472, modifying Section 22, to the effect that the President may now take immediate action pending the proceedings before the Tariff Commission. For the legislative history of Section 104, see *infra*, pp. 28-29. Cf. statement of Secretary of Agriculture Benson, on April 9, 1953, before the Senate Committee on Agriculture and Forestry pointing out that experience had proven that the procedure set forth in Section 22 was wholly ineffective to meet the problem and needed strengthening. Foreign Trade in Agricultural Products, Hearings before the Committee on Agriculture and Forestry, United States Senate, 83d Cong., 1st sess., pp. 10, 14.

tract between the Canadian exporter and the United States importer include a clause in which the importer would give an assurance that the potatoes would not be diverted or reconsigned for table stock purposes (R. 153-154).[5]

In exchange, the United States agreed not to impose the quantitative limitations or fees, provided for in Section 22, upon Canadian potatoes of the 1948 crop and, furthermore, gave assurances that certain anticipated potato price support measures of the Canadian Government, necessitated by the limitations on the export of table stock potatoes, would not be considered subsidies within the meaning of Section 303 of the Tariff Act of 1930 (46 Stat. 687, 19 U.S.C. 1303), authorizing the imposition of countervailing duties. The agreement went into effect on November 23, 1948 (R. 152),[6] and came to an end on June 20, 1949 (R. 136). On November 26, 1948, Canada issued an Order in Council subjecting potatoes to export control (R. 98-99).

2. *Respondent's Potato Imports.* In December 1948, respondent, a Virginia corporation which grows and ships potatoes and vegetables on the

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[5] The importation of seed potatoes was permitted in view of the traditional limited use of Canadian seed potatoes by some growers on the Atlantic seaboard (R. 112-113). There is no generic difference between seed and table stock potatoes; the former are of somewhat higher grade (R. 81.) Seed potatoes, therefore, can be sold for table purposes. (R. 51, 63, 81-82.)

[6] According to R. 136, it went into effect on December 1, 1948.

eastern seaboard of the United States (R. 1, 4, 150, 151, 158), purchased approximately 50,000 100-pound bags [7] of potatoes from a Canadian exporter, H. B. Willis (R. 13, 150-151). In view of the requirement of the Executive Agreement and of the Canadian Order in Council that the American importer give assurances that the potatoes would be used for seed purposes only and not diverted or reconverted for table stock purposes (*supra*, pp. 5-6), respondent wired Willis on December 27, 1948 (R. 18, 151):

> Certified seed potatoes loaded on S. S. *Gangway* are for planting in Florida and Georgia.[8]

Actually, only one-fifth of the potatoes were of a type suitable for planting in Florida (R. 100-101).

The S. S. *Gangway,* on which the potatoes were loaded, left Canada during the last days of December 1948 (R. 18) and arrived off Jacksonville, Florida, on January 9, 1949 (R. 18). On January 11, 1949, respondent sold all but 10,000 bags of the potatoes, without restrictions as to the disposition

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[7] Potatoes are commonly sold in 100-pound bags (R. 109).

[8] Respondent was well aware of the purpose and implications of this telegram. When questioned by the U. S. Department of Agriculture about a statement allegedly made by respondent that it had special permission to sell seed potatoes for edible use (R. 101-102), it denied having made such statement (R. 103) and added (R. 104):

> I realize fully the agreement with Canada, its intent and want to and expect to cooperate with the program. I am only bringing in seed [potatoes] for seed purposes * * *.

The Court of Appeals found that respondent's officers knew of the Executive Agreement and its requirements (R. 165).

of the potatoes (R. 60, 151, 165), to the Atlantic Commission Company (R. 151), a fruit and vegetable buying subsidiary of the Great Atlantic and Pacific Tea Company (R. 41).[9] The Atlantic Commission Company resold some 13,600 bags to the A. & P., the rest to a number of fruit and vegetable wholesale dealers located in Florida, Georgia, and Alabama (R. 47-48, 159-161).[10] The evidence tends to indicate that most, if not all, of the potatoes were sold to retail establishments as table stock potatoes (R. 22-38, 165), and that four-fifths of the potatoes remained in Florida.[11]

This venture, made possible by respondent's misrepresentations to the Canadian and United States authorities, turned out to be highly profitable. The potatoes bought, per invoice dated January 4, 1949, at $88,350.08 (R. 150-151) were resold January 11 for $162,622.40 (R. 151). Taking into account the freight charges of $19,417.60 (R. 158) and the customs duties of approximately $37,000,[12] respondent was able to make within a week a profit of approximately $18,000 or 20 per cent, while sad-

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[9] The Great Atlantic and Pacific Tea Co. is essentially a retail grocery organization (R. 41).

[10] Atlantic Commission Co. resold to respondent 10,000 bags of potatoes at $3.65 per bag (R. 44-45, 151). Respondent disposed of these potatoes at prices ranging from $3.75 to $4.00 (R. 65-66; Exh. 4, R. 152).

Of the 48,553 bags of potatoes originally purchased by it, Atlantic Commission Co. resold 10,000 to respondent, as just stated, and sold 13,627 to the A. & P. (R. 159) and 24,926 (34,926 less 10,000 to respondent) to various wholesalers (R. 160-161).

[11] 36,728 bags (R. 159-161).

[12] $0.75 per cwt. (See *supra*, fn. 3, p. 4.)

dling the United States with the virtually certain liability of having to purchase almost 50,000 additional bags of potatoes at an average price of $3.00.[13]

3. *The Proceedings Below.* On January 17, 1951, the United States brought this suit in the District Court. Its complaint was based essentially on the theory that the clause "certified seed potatoes * * * are for planting in Florida and Georgia," contained in the contract between respondent and the Canadian exporter (*supra*, p. 7) constituted a promise for the benefit of the United States, that respondent had breached this contract, and that as a result of this breach the United States was compelled to purchase 48,544 additional bags of potatoes under the Agricultural Act of 1948 at a net cost of $150,486.[14] The complaint asked for $150,486 in damages (R. 1-4).

The District Court sustained the complaint against a motion to dismiss (R. 13-16), holding that respondent had made a promise to use the potatoes for seed only and that the United States was the beneficiary of this undertaking (R. 15-16). However, at the trial, the District Court directed a verdict in favor of respondent at the conclusion of the Government's case (R. 147-149) on the grounds

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[13] See *supra*, fns. 1, 2, 10, 11, pp. 3, 8.

[14] This sum is based not on the support price paid by the United States for 48,544 bags of potatoes but on the net costs to the United States (cf. R. 90-92). For an alternative method of computing the damages based upon the farm support price of potatoes in the Jacksonville area, cf. R. 86-88, 157.

that respondent had not breached its agreement and that the Government had not shown any damages.

The Court of Appeals affirmed the decision of the District Court but on other grounds (R. 164-170). It concurred in the finding of the District Court that the telegram stating that the potatoes were for planting consummated a contract designed to benefit the United States (R. 166, 169). Disagreeing with the District Court, the Court of Appeals had "little difficulty in seeing in the evidence breach of contract on the part of defendant and damage resulting to the United States from breach" (R. 166).[15] It sustained the decision of the District Court because it considered the contract unenforceable for two reasons. First, it held that the contract merely sought to carry out the Executive Agreement and that the Agreement was void because (a) the President lacked the power to enter into the Executive Agreement since he had not been granted specific authority either by the Constitution or by Congress (R. 166-169), and (b) the President could not avoid compliance with the specific statutory procedure, provided by Congress in Section 22 of the Agricultural Adjustment Act, through the expedient of entering into an Executive

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[15] The court found that "there is evidence from which the jury could properly have drawn the conclusion that they were sold on the market as food displacing potatoes grown in this country and causing damage to the United States by requiring greater purchases of American grown potatoes in aid of the price support program than would have been necessary in the absence of their importation" (R. 165-166).

Agreement. Second, the court held that it could not give effect to the contract unless Congress had expressly authorized a suit by the Government for damages as a method of enforcing "what is essentially a breach of a trade regulation" (R. 166, 167-170).

SUMMARY OF ARGUMENT

This case presents two different types of problems. The first and major one is whether the Potato Executive Agreement of November 23, 1948—the ultimate basis of the Government's claim—is valid. The Court of Appeals held that it was not. The second problem is whether, granting the validity of the Agreement, the United States may recover for a breach of contract. The Court of Appeals held that respondent's promise to abide by the Agreement is not enforceable by the Government without specific statutory authorization. Connected with the second question are some subsidiary issues decided in the Government's favor in the court below, *i.e.*, whether respondent made a promise enforceable under the law of third-party beneficiary contracts, whether this promise was breached, and whether the United States suffered any damages from the breach.

I

The President had full authority to enter into the Potato Agreement with Canada.

A. The main ground of the adverse holding below appears to be that the Agreement conflicted

with the Agricultural Adjustment Act, Section 22 of which provides an administrative procedure for dealing with imports interfering with the price support program. The fact is, however, that there is not only no conflict between the Agreement and the statutory purposes and objectives but that the statute envisages, and gives legislative sanction to, the making of the Agreement.

1. The most effective means of dealing with imports which interfere with a domestic program is through bilateral negotiation rather than unilateral imposition of import restrictions. This has long been recognized by both Congress and the Executive and, accordingly, for about seventy-five years it has been understood that unilateral powers such as those granted in Section 22 do not preempt the field; on the contrary, these powers are designed to strengthen the President's ability to negotiate by giving him a statutory—but not exclusive—internal remedy if diplomacy fails. For instance, although the Tariff Act of 1890 provided special unilateral powers to restrict imports and did not refer to executive arrangements, the President concluded some twelve reciprocal trade agreements with the same objectives as the Act; Congress later indicated approval of this course. The practice has been similar with respect to several later statutes authorizing restrictive measures.

2. Congress was aware of this history, and enacted Section 22 in its light. Moreover, the Section's post-legislative history, including subsequent

amendments, indicates that Congress did not disapprove of the Potato Agreement after it had been brought to its attention.

3. Furthermore, Section 22 authorized, by clear implication, the making of this type of arrangement. Subsection (f) expressly provided that the administrative mechanism of Section 22 was not to be enforced "in contravention of any treaty *or other international agreement* to which the United States is or *hereafter* becomes a party" (emphasis added). This plainly envisaged future agreements other than treaties, and even agreements in *conflict* with the policy of Section 22. Certainly, the provision also sanctioned agreements designed to carry out the spirit and objectives of the statute.

4. It is not denied, either by respondent or the court below, that the Potato Agreement furthered the congressional policy of Section 22. The President adopted this advice, sanctioned and contemplated by Congress, because otherwise there would have been no effective method of fulfilling the legislative purpose and preventing an unwarranted drain on the Treasury, in the emergency circumstances then prevailing.

B. Apart from Section 22, the President has general non-statutory power to consummate an executive arrangement like the Potato Agreement.

1. Under the Constitution, the country possesses all the normal powers of a sovereign nation, and the Federal Government has all such powers incident to external sovereignty—not merely those dele-

gated to it in terms. *United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304.

2. In the conduct of foreign relations, the President's role is major, as has been recognized from the beginning. He is the instrument of the United States in international affairs, except where the Constitution provides otherwise, and is charged (in John Marshall's words) "with the whole foreign intercourse of the nation".

3. The treaty clause of the Constitution provides for Senate participation where treaties are involved, but the United States can consummate agreements which are not treaties in the Constitutional sense and do not require Senate action. The text of the Constitution (Art. I, Sec. 10, pars. 1-3) indicates that the framers were well aware of the distinction between formal treaties and international arrangements of a lesser order. And the making of such agreements, in proper cases, has been recognized as valid by Congress since 1792, has been continuously done since the early days of the Republic, and has had the approval of this Court. Some of these arrangements have rested on specific presidential powers, such as those he has as Commander-in-Chief, but many agreements of varied types have been based on the President's general power in the field of foreign relations. Long continued usage thus combines with the words of the Constitution and the accepted theory of the Federal Government's powers to sanction executive agreements in appropriate instances. Like

treaties, such Presidential agreements can, of course, be modified or rescinded (for domestic purposes) by later legislation or treaties.

4. The Potato Agreement plainly falls within the class of executive agreements which the President can make without Senate participation. It is a typical minor non-political arrangement, limited in scope and duration, made with a neighboring nation, and involving few, if any, commitments on the part of this country. Our history shows that comparable agreements have often been cast into this form, particularly with Canada. See also *supra*, p. 12.

The power of Congress to enact commercial legislation, under the commerce clause, does not prevent the President from making such an arrangement as the Potato Agreement, under his authority to conduct foreign affairs. As the history of treaty-making shows, Congressional power to legislate on certain matters does not automatically exclude those subjects from the reach of the foreign relations power. Especially where aliens are involved, legislative power is normally limited to American territory and the foreign relations power—whether exercised through treaty or Presidential agreement—is therefore coordinate and concurrent when the field is one such as foreign commerce. The concurrent nature of these powers has long been recognized in practice, as well as by this Court. See, *e.g.*, *Chicago and Southern Air Lines* v. *Waterman Corp.*, 333 U.S. 103.

II

The United States is a third party beneficiary of the contract, made under the Potato Agreement by respondent and the Canadian exporter, and may recover the damages it suffered as a result of the breach of this contract.

A. Respondent's promise to use the potatoes only for planting in Florida and Georgia is enforceable by the United States without express statutory authorization. No such statute is required to give effect to a promise running to the benefit of the United States, at least where an accepted type of transaction or liability is involved. *Dugan* v. *United States*, 3 Wheat. 172; *Cotton* v. *United States*, 11 How. 229. The enforcement of respondent's third-party beneficiary contract would merely carry out a traditional liability; it would not create a new one by way of analogy. *United States* v. *Standard Oil Co. of California*, 332 U. S. 301, and *United States* v. *Gilman*, 347 U. S. 501, are therefore not applicable.

B. 1. Respondent's promise for the benefit of the United States as a third party is governed by federal law, which gives effect to contracts for the benefit of third parties. The same result would follow under the law of any State or Canadian province which could be said to govern the enforceability of respondent's promise. Moreover, the United States is a direct and not merely an incidental beneficiary.

2. The Court of Appeals properly held that the United States had made out a case for the jury on the issue of whether there had been a breach of contract. Respondent violated its undertaking "not to divert or reconsign" the seed potatoes "for table stock purposes" by selling them without any restrictions as to their use. The mere designation "seed potatoes" did not constitute any protection for the United States, since seed potatoes are table potatoes of a superior type and respondent's purchasers were essentially in the grocery—not the seed potato—business.

The court below was also correct in holding that damage had been sufficiently proved. The Government's evidence indicated that it clearly had been injured; at least 25,500 bags of potatoes not suitable for planting in Florida remained in that State and were in all probability used for table purposes, thus displacing American grown table potatoes and increasing the financial burden of the potato price support program. The "fact of injury" has been established, and it was competent for the jury to determine its extent. Respondent may not be permitted to escape responsibility because the damages can be proved only by way of approximation.

ARGUMENT

I

The President Had Authority to Enter into the Potato Agreement with Canada

The primary basis of the judgment below is that the President was without authority to conclude

the Potato Agreement with Canada. The Court of Appeals' initial reason for this ruling seems to be that the President cannot, without Congressional authorization, consummate an international agreement regulating foreign commerce, because that field is reserved by the Constitution to Congress or to the making of a formal treaty (R. 166-167). The second ground relied upon to invalidate the Executive Agreement is that its making was essentially in conflict with the statutory procedure prescribed in Section 22 of the Agricultural Adjustment Act which established an elaborate administrative procedure for dealing with imports interfering with the price support program (R. 168). Our position on the first ruling is that, even though Congress has power under the Constitution to regulate foreign commerce, the President has the constitutional authority, as the Nation's instrument in the conduct of foreign affairs, to execute an agreement with a foreign country by which that nation agrees to restrict exports to the United States. On the second branch of the holding, our view is that the agreement, far from conflicting with either the spirit or the terms of the Agricultural Adjustment Act, is fully consonant with its purpose and provisions and, indeed, is envisioned and even sanctioned by the statute.

We deal first with the second branch of the holding since it appears to have been the main reliance of the court below. Only if the Court rejects our argument on that point will there be occasion to

consider the broader question of the power of the President to act where Congress has not spoken.

A. *The Potato Agreement is sanctioned by the Agricultural Adjustment Act and conflicts with no statute.*

Though it indicates that the Potato Agreement would be unauthorized even in the absence of the statute, the court below seems ultimately to have placed its decision that the Agreement is invalid on the assumption that it conflicted with Section 22 of the Agricultural Adjustment Act (R. 166-168). The court construed that section as establishing an elaborate and exclusive method of procedure in dealing with imports which interfered with the price support program (*supra*, pp. 10-11), and held that the President could not "avoid" compliance with these procedural requirements by recourse to his foreign relations power (R. 168). The fact is, however, that there is not only no conflict between the Agreement and the purposes and objectives of the statute but that the statute envisages, and gives legislative sanction to, the making of the Agreement.[16]

1. In enacting Section 22 of the Agricultural Adjustment Act Congress did not intend to preempt the field to the exclusion of the exercise of

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[16] For this reason, it is unnecessary, as not being a part of this case, to discuss either the extent to which the Congress can limit the exercise of the President's foreign relations power, or the authority of the President to make agreements inconsistent with a pre-existing statute or treaty.

the foreign relations power. Section 22 deals with a problem frequently recurring in international relations. A foreign state may discriminate against the United States or flood our country with imports to the extent of undermining our economy, or its imports may interfere with legislative programs, as in this case. There are two basic methods by which to cope with such disturbances: a diplomatic settlement through bilateral negotiation, or the invocation of unilateral measures, such as reciprocating discrimination or the imposition of burdens on imports like additional duties, import quotas, or even complete embargoes. The former method has been utilized by the President under his foreign relations powers; the latter often requires an act of Congress.[17]

The court below assumed that these two methods of dealing with the problem are mutually exclusive —that the specification by Congress of a particular procedure leading to unilateral action [18] made that method the exclusive one for settling the international problem and automatically terminated the Executive's power to adjust the dispute by negotiation. This interpretation of legislation such as Section 22 is unrealistic because it defeats its

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[17] Cf. the discussion between Senator Millikin and Mr. Brown, Director of the Office of International Trade Policy, Department of State, on the extension of the Reciprocal Trade Agreements Act, Hearings before the Committee on Finance, United States Senate, 81st Cong., 1st sess., on H. R. 1211, p. 844. See also *American State Papers*, Class I, Vol. 5, pp. 1-2.

[18] These powers are basically limited to the territorial limits of the United States; see *infra*, p. 55.

own purpose, and also conflicts with the well established understanding of both Congress and the President that such a statute is intended to supplement, not to supplant, the President's foreign relations powers.

If the purpose of retaliatory legislation in the field of foreign commerce were limited to actual punishment, it would in most cases be doomed to failure, since the other country is usually able to impose equally onerous counter-reprisals.[19] Thus employed, retaliation would normally lead to the deterioration of foreign relations in geometric progression. For this reason it has long been realized that the real function of this type of statute is to induce the other country to desist from its objectionable activities. As early as 1820, it was said in *The Francis and Eliza,* 108 Fed. 541, 545-546 (E.D. La.), reversed on other grounds, 8 Wheat. 458:

> Before we proceed to the examination of the merits of this case, it is proper to observe that the law upon which the libel is founded is a retaliatory law. It is intended to produce a great political effect; one of much importance to the trade and navigation of the United States. It is calculated so to operate upon Great Britain as to induce her to relax from her strict and rigid exclusion of American com-

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[19] Cf. R. 143, and Senator Tydings' pertinent remarks at 79 Cong. Rec. 11503.

> merce and navigation from her ports on this continent and in the West Indies. * * *
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> * * * * *
>
> We here plainly discover that the policy of Great Britain is to secure to herself the monopoly of trade and navigation of her colonies. The policy of the United States, in passing this law, is no less obvious. It is to cut off and prevent all communication between the colonies of Great Britain and the United States until she shall consent to a mutual intercourse.[20]

This goal of amicable adjustment cannot ordinarily be achieved by two independent legislatures without channels of communication, but only by way of negotiation between the branches of the governments which are equipped to deal directly with each other.[21] It has been understood by the

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[20] The statute involved was the Act of April 18, 1818, 3 Stat. 432, closing all ports of the United States to British vessels coming from ports closed to American vessels. For the diplomatic negotiations to reach a mutually satisfactory solution of the problem, cf. *American State Papers*, Class I, Vol. 5, pp. 81-90; *ibid.* Vol. 6, pp. 963-985. See also fn. 21, *infra*.

[21] Cf. *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 320, and *infra*, p. 36; and see Memorandum submitted by Attorney General (now Mr. Justice) Jackson, Hearings before the Committee on Finance, United States Senate, 76th Cong., 3d Sess. on H. J. Res. 407 (Extension of Reciprocal Trade Agreements Act) p. 732, 86 Cong. Rec. 3677, 3678.

It is noteworthy that the Acts of May 6, 1822, 3 Stat. 681, and May 29, 1830, 4 Stat. 419, authorized the President to lift the restrictions of the Act of April 18, 1818, *supra*, fn. 20, if he should receive satisfactory evidence that Great Britain would open her ports in the West Indies to American vessels. The settlement of this dispute with Great Britain (cf. Proclamation of October 5, 1830, 4 Stat. 817) was achieved not by a treaty but by way of informal agreement. Second Annual

Congress and by the Executive for at least three-quarters of a century that retaliatory powers are granted to the President primarily in order to strengthen his position at the conference table[22] and that their actual use is to be secondary, only after attempts at amicable settlement have failed.[23] Similarly, statutory provisions like Section 22 cannot be read as indicating an intent to preempt the field to the exclusion of the foreign relations power.[24]

Section 3 of the Tariff Act of 1890, 26 Stat. 612, is the leading instance of retaliatory legislation

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Message of President Jackson of December 6, 1830, Register of Debates in Congress, 21st Cong. 2d Sess., Appendix ii, iii, 2 Richardson, *Messages and Papers of the Presidents*, 500, 501-504; see also *American State Papers*, Class I, Vol. 6, pp. 963-988, and Memorandum submitted by Attorney General Jackson, *supra*, pp. 731-733, 86 Cong. Rec. 3678.

[22] See, *e. g.*, President Grant's Message to Congress of December 5, 1870, *Foreign Relations of the United States*, 1870, pp. 10-13, in which he asked for legislation authorizing him to terminate certain Canadian transit privileges should Canada "repeat their unneighborly acts against our fishermen." The import of this request was not to limit the President's choice of remedies to the termination of these privileges but to improve the chances of a favorable outcome of the negotiations.

Cf. President Theodore Roosevelt's advice to talk softly while carrying a big stick.

[23] See, *e.g.*, the imposition of penalty duties under Section 3 of the Tariff Act of 1890 (*infra*, pp. 23-25) "on Colombia, Venezuela and Haiti, after these States had been asked to negotiate and had failed satisfactorily to respond." U. S. Tariff Commission, *Reciprocity and Commercial Treaties* (1919) p. 27.

[24] Diplomatic negotiations can often be far more effective than unilateral action, since the former can operate prospectively and thus prevent the occurrence of the disturbance. The statutory remedy, on the other hand, usually becomes operative only after the interference with our interests has actually taken place. This is another reason why it is extremely un-

which served as the basis for the conclusion of executive agreements in the commercial field.[25] This provision, held constitutional in *Field* v. *Clark*, 143 U.S. 649, 680-691, authorized the President, if he found that a country imposed unequal or unreasonable duties upon certain articles imported from the United States, to suspend the duty-free importation of those goods from such a country into the United States.[26] Although Section 3 made no reference to the conclusion of agreements, it was utilized as the bargaining basis for at least twelve reciprocal trade agreements with the same objectives as the Section (Sen. Exec. Doc. 119, 52d Cong., 1st sess., p. 2). Subsequent congressional discussion disclosed that both political parties fully approved of this use of the President's foreign relations power (26 Cong. Rec. 6981-7000). It was even suggested on the floor of the Senate that the grant to the President of retaliatory powers in Section 3 carried with it direct authority to eliminate discrimination by way of negotiation (26 Cong. Rec. 6991).[27] And Section 71 of the Tariff

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likely that such a statute seeks to prohibit preventive negotiations.

[25] Though the proposition can hardly be denied, we show below in some detail (*infra*, pp. 31-57) that, in proper cases, the President may enter into executive agreements, and that treaties made with Senate participation are not the only arrangements this country may make with foreign nations.

[26] A similar retaliatory clause was found in Section 5 of the Meat Inspection Act of 1890, 26 Stat. 414, 415.

[27] While at least one Senator disagreed with this broad interpretation of the clause (26 Cong. Rec. 6991), no one suggested that the grant of retaliatory powers negatived the power to negotiate Executive Agreements. It should be noted that

Act of 1894 (28 Stat. 569), which repealed Section 3 of the Tariff Act of 1890, contained an express provision saving the reciprocal arrangements entered into under Section 3. The practice with respect to several later statutes authorizing restrictive measures has been similar; executive agreements have often been made, both under and apart from specific authorization, in order to effectuate the general statutory policy. See McClure, *International Executive Agreements* (1941), pp. 84-92, 173-189, and Appendix B, *infra*, pp. 81-97.[28]

This Court, too, has recognized in general terms that legislation enacted "for the protection of the interests of our people, against the unfriendly or discriminating regulations established by foreign governments, in the interests of their people" (*Field* v. *Clark*, 143 U.S. 649, 691) is not intended

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Congress had refused to include in the Tariff Act of 1890 a provision expressly authorizing the making of reciprocal trade agreements (cf. statement of Senator Gray at 26 Cong. Rec. 6987; U. S. Tariff Commission, *Reciprocity and Commercial Treaties* (1919) 27, 145-150).

[28] Examples of these statutes are: Tariff Act of 1909, Section 2, 36 Stat. 82; Tariff Act of 1922, Section 317, 42 Stat. 944; Tariff Act of 1930, Section 338, 46 Stat. 704, 19 U. S. C. 1338. The latter provision is still in effect. Under the Reciprocal Trade Agreements Act (48 Stat. 943, 19 U. S. C. 1351-1354), the power of retaliation has also been utilized as a basis for negotiations rather than for unilateral action. Cf. *Policy of United States Concerning Generalization of Tariff Concessions*, 12 Department of State Press Release 212, 214, 219. The Anti-dumping Act of 1921, 42 Stat. 11, 19 U. S. C. 160-171, and Section 303 of the Tariff Act of 1930, 46 Stat. 687, 19 U. S. C. 1303, raise similar problems. See also 19 U. S. C. 130, 131, 46 U. S. C. 141, 142 (tonnage duties).

In Appendix B, *infra*, pp. 81-97, we set forth a study on executive agreements which differ in their terms from legislation on foreign commerce.

to be a restrictive and binding mandate, limiting methods of redress to the specific means enumerated in the statute. On the contrary, it has pointed out that these statutes are intended to confide to the President additional "large discretion" (*Field* v. *Clark,* 143 U.S. 649, 691), and "an authority which was cognate to the conduct by him of the foreign relations of the Government". *Panama Refining Co.* v. *Ryan,* 293 U.S. 388, 422; *United States* v. *Curtiss-Wright Corp.,* 299 U.S. 304, 327. This attitude is particularly pertinent to legislation like Section 22, the purpose of which was and is to prevent imports from interfering with various types of domestic agricultural programs.

2. Against this background, Section 22 of the Agricultural Adjustment Act [29] cannot properly be read as providing for an exclusive method of limiting exports interfering with the price support program, or as curtailing the powers the President otherwise might have had under his foreign relations powers.[30] Moreover, the particular legisla-

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[29] Section 22 was originally inserted into the Agricultural Adjustment Act by Section 31 of the Act of August 28, 1935, 49 Stat. 773.

[30] The reports submitted to Congress in connection with the Reciprocal Trade Agreements Act of 1934 and its extensions disclose that Congress has been fully aware of the interpretation of Section 3 of the Tariff Act of 1890, discussed above. See *e.g.*, H. Rep. 1000, p. 9, 73rd Cong., 2d Sess. (1934); S. Rep. 871, p. 12, 73rd Cong., 2d Sess.; H. Rep. 166, pp. 14-15, 75th Cong., 1st Sess. (1937); Sen. Rep. No. 111, pp. 19-20, 75th Cong., 1st Sess. (1937); H. Rep. 1594, pp. 34-35, 76th Cong., 3d Sess. (1940); S. Rep. No. 1297, p. 5, 76th Cong., 3d Sess. (1940).

tive and post-legislative history of Section 22 discloses that Congress realized fully that its effect would be to enhance and strengthen, rather than to curb, the President's foreign relations power and that the President's action to prevent the interference of imports with the operation of the price suppo. . program would not be limited to the measures enumerated in the Act but might take the form of agreements with foreign countries. During the discussion which preceded the enactment of Section 22, Congress was informed (79 Cong. Rec. 11503) that the President had utilized the analogous provision of Section 3(e) of the National Industrial Recovery Act as the basis of negotiations under which Japan (as did Canada in the instant case) agreed to limit its export of pencils to the United States (see *Foreign Relations of the United States,* 1934, Vol. III, pp. 801-805).[31]

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[31] The possible argument that Section 22 is couched in mandatory language ("the President shall") and, hence, that the President has to follow the statutory procedure once its conditions have been met, and is not at liberty to follow another method of reaching the same result, is in conflict with the legislative history of Section 22 [cf. 79 Cong. Rec. 9591-9592 (rejection of amendment to make Section 22 mandatory); 79 Cong. Rec. 11497-11512, 11521-11526 (constant reference to intent to delegate discretionary powers to President); see also 99 Cong. Rec. 7876, 7881, 7906-7907], and with practice under it (30 Dept. of State Bulletin 385). Moreover, the mandatory language of subsection (b) becomes operative only in the event of a formal report by the Tariff Commission, and no such report had been requested or submitted with respect to potatoes in 1948.

The post-legislative history of Section 22 similarly indicates that Congress did not believe that that provision denied to the President the use of his foreign relations powers to bring about the objectives of the Agricultural Adjustment Act. The text of the Potato Agreement was promptly released to the press,[32] and it was discussed with a Congressional Committee as early as February 1949.[33] In the following two years, Congress twice amended Section 22 (Acts of June 28, 1950, Section 3, 64 Stat. 261, and June 16, 1951, Section 8(b), 65 Stat. 75),[34] so as to limit the President's power to enter into agreements *inconsistent* with the policy of the Act. The amendatory acts contain nothing indicating a congressional purpose that the President should carry out the policy of the Act only by unilaterally imposing import restrictions and not by diplomatic means; there was no opposition whatever to agreements consonant with the legislative goal.

The Potato Agreement was again brought to congressional attention on April 6, 1953.[35] Section

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[32] Dept. of State Press Release 954, Nov. 26, 1948; see also 19 Dept. of State Bulletin 744.

[33] Extension of Reciprocal Trade Agreements Act, Hearings before the Committee on Finance, United States Senate, 81st Cong., 1st sess., pp. 898-899, 918-920 (February 24, 1949).

[34] See S. Rep. No. 1375, 81st Cong., 2d sess., p. 4; H. Rep. No. 2269 (conference report), 81st Cong., 2d sess., p. 5; S. Rep. No. 299, 82d Cong., 1st sess., p. 7; H. Rep. No. 537 (conference report), 82d Cong., 1st sess., p. 4.

[35] Treaties and Executive Agreements, Hearings before a Subcommittee of the Committee on the Judiciary, United States Senate, 83d Cong., 1st sess., on S. J. Res. 1 and S. J. Res. 43, p. 838. The decision below, which received considerable publicity, was issued nine days thereafter.

104 of the Trade Agreements Extension Act of 1953, 67 Stat. 472, amending Section 22(b) (*supra*, p. 5), was enacted four months later. Neither this statute nor the detailed debate in the Senate which discussed the means of improving the efficiency of Section 22 give the slightest reason to believe that Congress considered the Potato Agreement an invasion of its prerogatives or a violation of the statute.[36]

3. We can go further than the argument that Congress did not seek either to curb the President's power or to make the procedure of imposing unilateral import restrictions the exclusive one. For Section 22, as it stood on November 23, 1948 (when the Potato Agreement was concluded), by clear implication authorized the making of this type of arrangement. Subsection (f) (*infra*, p. 79) expressly provided that the administrative mechanism of Section 22 was not to be enforced "in contravention of any treaty *or other international agreement* to which the United States is or *hereafter* becomes a party" [emphasis added]. By these words the subsection plainly contemplated that "international agreements" other than treaties—i.e., executive agreements—could and would be "hereafter" made in the field to which Section 22 relates. More than that, Congress assumed that the President had authority to negotiate agreements *in conflict* with the policy of Section 22 and

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[36] 99 Cong. Rec. 7876-7883, 7902-7912; see also H. Rep. (Conference) No. 1089, 83d Cong., 1st Sess., p. 4.

specifically declared that such contravening agreements would take precedence over the statutory policy. It would be incongruous, to say the least, to suppose that Congress recognized the President's authority to depart from the policy of Section 22 by way of Executive Agreement but denied him the use of that method when he sought to carry out the spirit and purpose of the statute. Section 22(f), therefore, can and should be read as legislative authorization for precisely the kind of agreement which is under attack here. No one denies the power of Congress to grant such authority or the competence of the President to take action under it.[37]

4. In its detail and as a whole, this history indicates that Congress did not intend to preempt the field when it enacted Section 22 of the Agricultural Adjustment Act and that the unilateral methods provided for in Section 22, exposing the United States to possible retaliation, were not believed to preclude the Executive from making such agreements with foreign nations as would be mutually satisfactory as well as harmonious with the aims of the statute. Indeed, Section 22(f), *supra*, p. 29, shows that arrangements like the Potato Agreement were sanctioned by the Congress in advance.

The Potato Agreement was not merely compatible with the policy and objective of Section 22, *i.e.*, to curtail imports interfering with the price sup-

[37] See Arthur S. Sutherland, *The Bricker Amendment, Executive Agreements, and Imported Potatoes*, 67 Harv. L. Rev. 281, 290-291.

port program. The Agreement actively furthered that Congressional policy by making sure that Canadian potatoes would not come into this country under conditions and in quantities which would tend to render ineffective, or interfere with, the potato subsidy program. Neither respondent nor the court below has denied that this is so, or suggested otherwise. The simple fact is that if it were not for the Potato Agreement, the legislative goal would have been seriously obstructed during the 1948-1949 season by a flood of Canadian potatoes. The unilateral mechanism of Section 22 was far too cumbersome and slow to meet the then existing need for quick action (*supra*, pp. 4-5), and the President adopted the traditional instrument of the executive agreement as the most appropriate mechanism for fulfilling the purposes of Congress's agricultural program in the emergency circumstances before him. Only in that way was it practicable to prevent the jeopardizing of the Congressionally authorized potato program and the consequent drain upon the federal treasury through the importation of excessively large foreign supplies into the American market to share in the benefits of the support program.

B. *The President has general power to enter into Executive Agreements of the type of the Potato Agreement*

Because the initial portion of the Court of Appeal's opinion seems to make such a radical departure from the accepted doctrine of the Presi-

dent's role in the conduct of the country's foreign affairs, we feel it appropriate to cover once again some well-trodden ground, in a return to certain of the fundamentals of our constitutional system.

The basic axiom is that, as a sovereign state, the United States possesses, in its dealing with other states, all of the normal powers of a fully independent nation, subject to constitutional limitations like the Bill of Rights which govern all exercise of governmental authority in this country. *Infra*, pp. 30-35. These foreign affairs powers have been mainly entrusted to the President who is the country's organ in its relations with other nations. *Infra*, pp. 35-39. The Treaty Clause of the Constitution (Article II, Section 2) provides for Senate participation where a treaty is involved, but the United States can consummate agreements which are not treaties in the Constitutional sense and do not require Senate action, and the President has authority to make such arrangements acting alone. *Infra*, pp. 39-49. Lesser commercial or trade understandings like the Potato Agreement have long been regarded as appropriate for an executive agreement. *Infra*, pp. 50-54. And it is also settled that where there is Presidential power to take action in the conduct of international relations, the existence of general authority of Congress under the Constitution in the same field—*e.g.*, foreign commerce—does not preclude foreign affairs action by the Executive. *Infra*, pp. 54-57.

1. *The plenary foreign relations power of the United States.*—It is often said that under our

Constitution the "federal union is a government of delegated powers. It has only such as are expressly conferred upon it and such as are reasonably to be implied from those granted" (see *e.g., United States* v. *Butler*, 297 U.S. 1, 63). But, as the Court has pointed out repeatedly, care must be taken to limit this characterization of our national government to its proper province, *i.e.*, the field of internal affairs (*Carter* v. *Carter Coal Co.*, 298 U.S. 238, 295; *United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304, 315-318; and *Youngstown Co.* v. *Sawyer*, 343 U.S. 579, concurring opinions of Justices Frankfurter and Jackson at 610, and 635-636, fn. 2). For it is the basis of our constitutional plan that we are several as to all domestic matters—except so far as authority has been expressly delegated to the Federal Government—and one as to all foreign affairs.[38]

Accordingly, this Court indicated from the very outset that the Federal Government had all the rights of external sovereignty—not merely those expressly delegated to it in the Constitution. Cf. *Penhallow* v. *Doane*, 3 Dall. 54, 80-81, 92-96; *Ware* v. *Hylton*, 3 Dall. 199, 232. Despite some dispute as to the source of the full rights of external sovereignty

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[38] Cf. Thomas Jefferson's letters of August 14, 1787, to George Washington and Joseph Jones quoted in Warren, *The Making of the Constitution* (1937 ed.) 451; and see the concurring opinion of Mr. Justice Frankfurter in *United States* v. *Pink*, 315 U. S. 203, 242: "In our dealings with the outside world, the United States speaks with one voice and acts as one, unembarrassed by the complications as to domestic issues which are inherent in the distribution of political power between the national government and the individual states."

held by the national government,[39] there is agreement that under our constitutional plan full sovereignty in external affairs is vested in the Federal Government and that the country possesses all the normal powers of a sovereign nation. See Corwin, *The President, Office and Powers* (1948 ed.) pp. 209-213. The Court has consistently held that this country is "invested with power over all the foreign relations of the country" (*Knox* v. *Lee*, 12 Wall. 457, 555, Bradley, J., concurring) or "with the entire control of international relations, and with all the powers of government necessary to maintain that control and to make it effective."

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[39] Some have believed that external sovereignty passed directly from the British crown to the Continental Congress and from it, through the Confederation, to the present United States, and was never possessed by the several States. See Mr. Justice Chase in *Ware* v. *Hylton*, 3 Dall. 199, 232. The famous holdings of Mr. Justice Paterson in *Penhallow v. Doane*, 3 Dall. 54, 80-81, and of Chief Justice Jay in *Chisholm* v. *Georgia*, 2 Dall. 419, 470-471, place the same interpretation on the historic events leading to the formation of the Union. *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 316-317. To the same effect, see Story, *Commentaries on the Constitution* (5th ed.), Secs. 198-217, especially Sec. 216; Miller, *Lectures on the Constitution, Davis' Notes*, 35-37; Butler, *The Treaty Making Power of the United States*, Vol. I, Secs. 22-36; 143-162; George Sutherland, *Constitutional Power and World Affairs*, 37-38, 44-45, 116-118.

On the other hand, Mr. Justice Iredell felt, in *Penhallow* v. *Doane*, 3 Dall. 54, 92-96, that external sovereignty was originally held by the States, which irrevocably transferred all of its incidents to the nation. To the same effect see *e.g.*, Attorney General Cushing, 8 Op. Atty. Gen. 411, 415, and James Brown Scott, *Proceedings of the American Society of International Law*, Vol. 28, p. 2, at 8-10; Levitan, *The Foreign Relations Power*, 55 Yale L. J. 467.

Fong Yue Ting v. *United States*, 149 U.S. 698, 711; see also *Burnet* v. *Brooks*, 288 U.S. 378, 396; *United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304, 318; and *Mackenzie* v. *Hare*, 239 U.S. 299, 311.[40] The contents and scope of the nation's foreign relations power have been largely developed from the rules of international law concerning sovereignty, rather than found in any specific constitutional grant. *Jones* v. *United States*, 137 U.S. 202, 212; *Nishimura Ekiu* v. *United States*, 142 U.S. 651, 659; *Fong Yue Ting* v. *United States*, 149 U.S. 698, 707-711; Cf. *Mackenzie* v. *Hare*, 239 U.S. 299, 311.[41]

2. *The President's role in the conduct of foreign affairs.*—The first draft of the Constitution, submitted by Mr. Pinckney on May 29, 1787, followed the example of Art. IX of the Articles of Confederation. It placed the foreign relations powers in the Senate[42] by giving it the "sole and exclusive power * * * to make treaties and to appoint Ambassadors" (Art. VII), while reserving to the President merely the ceremonial function of "receiv-

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[40] As stated by the late Mr. Justice (then Senator) Sutherland: "The sovereign will of the Nation is embodied in the Constitution and its exercise by the government is measured thereby; but in the one case [internal affairs] it is manifested by what that instrument affirms and in the other case [external affairs] by what it fails to negative." George Sutherland, *Constitutional Powers and World Affairs* (1919), 47. See also *Chae Chan Ping* v. *United States* (*The Chinese Exclusion Case*), 130 U. S. 581, 604.

[41] Cf. George Sutherland, *The Powers of the National Government*, Sen. Doc. No. 417, 61st Cong., 2d Sess., p. 7.

[42] 2 Curtis, *History of the Constitution of the United States*, 410.

[ing] public Ministers from foreign nations" (Art. VIII).[43]

Further reflection, however, convinced the members of the Constitutional Convention that the transaction of foreign relations, especially in view of its need for speed and secrecy, was essentially an executive function, to be subject to Senatorial control in those instances where the gravity of possible commitments made such checks desirable.[44] As early as June 18, 1787, Alexander Hamilton submitted a constitutional sketch which shifted the power to make treaties and to appoint ambassadors to the President, under Senatorial control.[45] On August 15, Mr. Mercer declared that the Senate ought not to have the treaty making power, since it was an executive function.[46] A week later, on August 23, James Madison remarked that the President should take part in the making of treaties, since the Senate represented the States alone.[47]

Viewed against this background, the final constitutional text discloses a deliberate design to place the foreign relations power in the President, subject to the controls expressly provided for. This is the way the Constitution was understood almost from the beginning. On April 24, 1790, Thomas

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[43] 3 Farrand, *Records of the Federal Convention*, 599.

[44] *The Federalist*, Nos. 64 and 75; Mr. Davie's Speech in the North Carolina Convention, 3 Farrand, *Records of the Federal Convention*, 347-399.

[45] 1 Farrand, *Records of the Federal Convention*, 292; see also 3 Farrand, *ibid.*, 619, 624-625.

[46] 2 Farrand, *ibid.*, 297.

[47] 2 Farrand, *ibid.*, 392.

Jefferson, then Secretary of State, gave the following official opinion:

> * * * The transaction of business with foreign nations is Executive altogether. It belongs, then, to the head of that department except as to such portions of it as are specially submitted to the Senate. Exceptions are to be construed strictly.[48]

Ten years later, on March 7, 1800, during the debate involving the extradition of Jonathan Robbins, John Marshall stated in the House of Representatives, of which he was then a member:

> * * * The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations. * * *
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> * * * * *
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> The Executive is not only the Constitutional department, but seems to be the proper department to which the power in question may most wisely and most safely be confided.
>
> The department which is entrusted with the whole foreign intercourse of the nation * * *.[49]

It is noteworthy that this statement, limited to the conduct of *foreign affairs,* did not arouse antagonism such as that brought on by Hamilton's assertion in the Pacificus papers that the President

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[48] *The Writings of Thomas Jefferson* (Memorial ed.) Vol. III, pp. 15, 16. See also the similar remarks of Madison in the House of Representatives, *Annals of Congress*, 1st Congress, cols. 463-464, 496, and Crosskey, *Politics and the Constitution of the United States*, Vol. 1, pp. 417-418.

[49] *Annals of Congress*, 6th Congress, cols. 613-614.

had all the *executive* powers.[50] On the contrary, it persuaded a large portion of the Republican opposition and secured the support of the administration, and obtained a vote of 61 to 35 in a House almost evenly divided on a party basis.[51] See also the Report of the Senate Committee on Foreign Relations, of February 15, 1816, partially quoted in *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 319.

It is unnecessary to recall in detail that the Court has repeatedly reaffirmed, in recent years, the conceptions underlying Jefferson's and Marshall's declarations. "In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. * * * the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution." *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 319-320. See also *United States* v. *Belmont*, 301 U. S. 324, 330; *United States* v. *Pink*, 315 U. S. 203, 222-223, 229-230;

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[50] Cf. the *Helvidius Papers*, 1 Madison, *Letters and Writings* 607-654.

[51] Beveridge, *The Life of John Marshall*, Vol. 2, pp. 473-475. The shrinkage of the Senate's role in the negotiation of treaties, in which it has an express place under the Constitution, has often been told. See Corwin, *The President—Office and Powers* (1948 ed.), pp. 253 ff.

Chicago & Southern Air Lines v. *Waterman Corp.*, 333 U. S. 103, 109; *Knauff* v. *Shaughnessy*, 338 U. S. 537, 542; cf. *Latvian State Cargo and Passenger Steamship Line* v. *McGrath*, 188 F. 2d 1000 (C. A. D. C.), certiorari denied, 342 U. S. 816; *The Maret*, 145 F. 2d 431 (C. A. 3); *Bernstein* v. *Van Heyghen Freres S. A.*, 163 F. 2d 246, 249 (C. A. 2), certiorari denied, 332 U. S. 772.

3. *The Treaty Clause and executive agreements.* Under Article II, Section 2, of the Constitution, the President

> shall have Power, by and with the Advice and Consent of the Senate, to make Treaties * * *.

"Treaties," however, are not the only means by which international transactions are conducted. Diplomatic practice recognizes a number of other less formal arrangements, such as *modi vivendi*, exchanges of notes, and other executive agreements -- "a bargain between independent states which is something less than a treaty"[52]—without which, in the words of John Bassett Moore, "current diplomatic business could not be carried on."[53] As a sov-

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[52] Baldwin, *The United States as a Great Power*, 9 Yale Review (Old Series) 399, 414.

[53] Moore, *Treaties and Executive Agreements*, 20 Political Science Quarterly 385, 389.

On executive agreements, see, generally, Hackworth, *Digest of International Law*, Vol. 5, pp. 392-397; 5 Moore, *International Law Digest*, 210-221; Crandall, *Treaties, Their Making and Enforcement* (2d ed., 1916), 102; Baldwin, *The United States as a Great Power*, 9 Yale Review (Old Series) 399; Foster, *The Treaty-Making Power under the Constitution*, 11 Yale L. J. 69; Barnett, *International Agreements without the*

ereign nation, the United States has, and must have, the capacity to enter into these lesser agreements (*supra*, pp. 32-35). Since the President is the nation's instrument in external affairs (*supra*, pp. 35-39), his is the department empowered to make such agreements, unless the Constitution provides otherwise in the Treaty Clause. But that carefully drawn clause does not stand in the way. Its terms and history, as well as the practice of a century and a half and the decisions of this Court, show that the formal treaty, consented to by the Senate, is not the only mechanism the United States can employ to attain international agreement.

a. In the vocabulary of the members of the Constitutional Convention, the term "treaty" did not cover every type of arrangement with a foreign nation. The very text of the Constitution proves this. Art. I, Sec. 10, carefully distinguishes between a "Treaty, Alliance and Confederation" which the States are absolutely prohibited from entering, and an "Agreement or Compact with an-

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Advice and Consent of the Senate, 15 Yale L. J. 18, 63; Sayre, *The Constitutionality of the Trade Agreements Act* (1939), 39 Col. L. Rev. 751; Levitan, *Executive Agreements: A Study of the Executive in the Control of the Foreign Relations of the United States* (1940), 35 Ill. L. Rev. 365; *Riesenfeld, International Relations*, 25 Cal. L. Rev. 643, 670-672; Borchard, *Executive Agreements and Treaties*, 53 Yale L. J. 664, 669-670, n. 20, 673-675; Comment: *Executive Agreements and the Proposed Constitutional Amendments to the Treaty Power*, 51 Mich. L. Rev. 1202, 1206-1207; Treaties and Executive Agreements, Hear ings before a Subcommittee of the Committee on the Judiciary, United States Senate, 83d Cong., 1st Sess., on S. J. Res. 1, etc., pp. 837, 853-861; Sen. Doc. No. 170, 82d Cong., 2d Sess. (1953), *The Constitution of the United States—Analysis and Interpretation*, edited by Edward S. Corwin, pp. 433 ff.; cf. *Watts* v. *United States*, 1 Wash. Ter. 288, 294.

other State, or with a foreign Power" which the States can make only with the consent of Congress. The draftsmen of the Constitution obviously made a distinction between treaties and compacts;[54] and since the records of debates of the Convention are silent on this point, the terms "treaty" and "agreement" or "compact" must have had distinct connotations to the meticulous members of the Convention.[55] Apparently, they were aware of the distinction made between treaties and less formal agreements in contemporary international law as evidenced by the writings of Vattel, whose teachings exerted a profound influence upon American statesmen and lawyers during the revolutionary period and virtually the first hundred years of the Republic.[56]

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[54] *Cf.* Taney, C. J., in *Holmes* v. *Jennison*, 14 Pet. 540, 571-572 (on the Compact Clause): "But the question does not rest upon the prohibition to enter into a treaty. In the very next clause of the constitution the states are forbidden to enter into any 'agreement' or 'compact' with a foreign nation; and as these words could not have been idly or superfluously used by the framers of the constitution, they cannot be construed to mean the same thing with the word treaty. They evidently mean something more, and were designed to make the prohibition more comprehensive."

[55] Weinfeld, *What Did the Framers of the Federal Constitution Mean by "Agreements or Compacts?,"* 3 University of Chicago L. Rev. 453, 457.

[56] Nussbaum, *A Concise History of the Law of Nations*, (Rev. Ed.) 161, 162; Butler, *The Treaty Making Power of the United States*, Vol. I, Sec. 152; Weinfeld, *ibid.*, at 458 *ff.* Lapradelle, Emer de Vattel in 3 Vattel, *The Law of Nations* (Carnegie ed.) xxix-xxxx. Levitan, *Executive Agreements*, 35 Ill. Law Review 365, 366-370. Thus, when the publisher of Vattel's *Laws of Nations* sent Benjamin Franklin three copies of the book in 1775, Franklin answered: "I am much

Vattel distinguishes between treaties which are "entered into by sovereigns for the welfare of the State, either in perpetuity or for a considerable length of time," and "agreements, conventions [or] arrangements" "which have for the object matters of temporary interest."[57] It is significant that two of the earliest interpretations of the Compact Clause refer to these portions of Vattel in order to explain the distinction between "treaties" and "agreements" or compacts.[58]

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obliged by the kind present you have made us of your edition of Vattel. It came to us in good season, when the circumstances of a rising State make it necessary frequently to consult the law of nations." 2 Wharton, *Revolutionary Correspondence*, 64. Vattel was cited in the first reported decision of a federal court, *The Resolution*, 2 Dall. 1, 15 (Federal Court of Appeals) (1781), and by both sides in *Respublica* v. *De Longchamps*, 1 Dall. 110, 112 (Oyer & Terminer, Philadelphia, 1784). James Wilson "esteemed as the most learned lawyer of his generation" (Reeves, *The Influence of the Law of Nature upon the International Law of the United States*, 3 Am. Jour. of Int. Law, 546, 552-553), was counsel in both cases. And see his reference to Vattel in the Pennsylvania Convention called to ratify the Federal Constitution, 2 Elliott, *Debates*, 454; Vattel was also cited to the South Carolina Convention. 4 Elliott, *Debates*, 277-278, 310. The first draft of the Constitution which distinguished between Treaties and Agreements was written in Wilson's handwriting. 2 Farrand, *Records of the Federal Convention* 163, 169.

[57] Vattel, *The Law of Nations* (Carnegie ed.), Vol. III, p. 160; Weinfeld, *ibid.*, at 460.

[58] Tucker's Blackstone's Commentaries, Vol. I, App. pp. 309, 310 (1803) and Chief Justice Taney in *Holmes* v. *Jennison*, 14 Pet. 540, 572. Mr. Tucker, a contemporary of the members of the Constitutional Convention (Weinfeld, *ibid.*, at 461), paraphrased Vattel in defining treaties as referring to "subjects of great national magnitude and importance * * * often perpetual or made for a considerable period of time." Mr. Justice Story, while feeling that this formula was at best a very loose

From Vattel and like publicists, the framers of the Constitution must have known that, in international usage, the term "treaty" does not cover all agreements with foreign nations. And by limiting the requirements of senatorial advice and consent to "treaties,"[59] they left undisturbed the power of the President, as the Nation's sole organ in the field of foreign relations, to enter into agreements of lesser importance, shorter duration, or different character.[60]

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and unsatisfactory exposition (2 Story, *Commentaries on the Constitution of the United States*, Section 1402), suggested that the term "treaties" applied to "treaties of a political character," while "compacts and agreements" "might then very properly apply to such as regarded what might be deemed mere private rights of sovereignty; such as questions of boundary; interests in land, situated in the territory of each other; and other internal regulations for the mutual comfort and convenience of states, bordering on each other" (*ibid.*, Section 1403). Compare the concept of International Administrative Law coined by L. v. Stein, *Einige Bemerkunken uber das Internationale Verwaltungsrecht*, 6 Schmoller's *Jahrbuch fur Gesetzgebung etc.* (1881), 395, 430 *ff.* While Vattel's formulation of the distinction between treaties and other agreements may have been imperfect and groping, it evidences the recognition, by the middle of the 18th century that a new, a non-political type of international arrangement had come into being (see *infra*, p. 52, fn. 77).

[59] It will be noted that Hamilton's draft constitution (*supra*, p. 36) required senatorial advice and consent for "all treaties, conventions and *agreements*," 3 Farrand, *Records of the Federal Convention*, 624-625 (emphasis added).

[60] The records of the Constitutional Convention indicate that when its members were referring to "treaties" they were thinking primarily of peace treaties and other treaties vitally affecting the fundamental interests of the Nation or of the States, such as their territorial integrity, or fishing and navigation rights, which were all-important in the 18th century. Farrand, *Records of the Federal Convention*, Vol. II, pp. 297-

b. Congress and the Executive have recognized since the earliest days of the Republic that the foreign relations of the United States are not to be conducted exclusively by treaty. As early as 1792, the Post Office Act authorized the Postmaster General to "make arrangements with postmasters in any foreign country for the reciprocal receipt and delivery of letters and packets, through the post-offices."[61] These were not treaties in the constitutional sense. If they had been, Congressional authorization would be of no avail to the President in the absence of the advice and consent of two-thirds of the Senators present.

Ever since the first decade under the Constitution, the President has entered into a large number of executive agreements, many with and many without the consent of Congress.[62] Those made without legislative consent or authorization have been of several types and with many nations. They

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298, 540-543, Vol. IV (Rev. ed., 1937) p. 58; see also the informative letter of Mr. Williamson to James Madison, *ibid.*, Vol. III, pp. 306-307; Warren, *The Making of the Constitution*, pp. 653-658; Warren, *The Mississippi River and the Treaty Clause of the Constitution*, 2 George Washington University Law Review 271, and Mr. Warren's testimony in Hearings before Subcommittee No. 3 of the Committee on the Judiciary, etc., House of Representatives, 78th Cong., 2d Sess., on H. J. Res. 6, etc., Serial No. 21, pp. 79-88.

[61] Sec. 26, 1 Stat. 232, 239. The Congressional debate discloses that the Second Congress was in no mood to enhance the power of the Executive. Cf. *Annals of Congress*, 2d Congress, cols. 230-236, 238-241.

[62] For their description and enumeration, see the authorities cited fn. 53, pp. 39-40, *supra*. Moore's 1905 article is the early classic in this field.

have covered many subjects, from the most trivial matters of diplomatic ceremony to more important arrangements of commercial or military consequence. "Among these are such as apply to minor territorial adjustments, boundary rectifications, the policing of boundaries, the regulation of fishing rights, private pecuniary claims against another government or its nationals, in Story's words, 'the mere private rights of sovereignty.'" [63] There have also been understandings as to the passage of troops, and commercial matters, including arrangements as to imports and exports and customs reciprocity.[64] For example, the 1907 "Gentlemen's Agreement" with Japan, pursuant to which Japan agreed not to issue any passports to its citizens for immigration to the United States, was a Presidential arrangement. Cf. Willoughby, *The Constitutional Law of the United States* (2d ed.) Vol. I. Section 287.

Many of these agreements may be said to have some sanction in powers expressly conferred on the President by the Constitution, such as his power as Commander-in-Chief [65] or his authority to re-

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[63] Sen. Doc. No. 170, 82d Cong., 2d Sess. (1953), *The Constitution of the United States of America—Analysis and Interpretation*, edited by Edward S. Corwin, at p. 433, see also fn. 58, *supra*, pp. 42-43.

[64] See *supra*, pp. 23-25, and Sayre, *The Constitutionality of the Trade Agreements Act*, 39 Col. L. Rev. 751, especially the Appendix at 770-775.

[65] *E.g.* Armistices and other military arrangements; *cf.* Moore, *Treaties and Executive Agreements*, 20 Political Science Quarterly 385, 390-392; Crandall, *Treaties, Their Making and Enforcement* (2d ed.), Sec. 56.

ceive foreign ambassadors.[66] However, a large and extremely important portion of them such as certain types of commercial agreements, boundary arrangements, and the settlement of claims,[67] do not find any express basis in the Constitution and rest exclusively on the President's general power over foreign relations. And even those agreements which can be tied to a specific executive power find their main support in the President's position as the country's representative in foreign affairs. For instance, the Litvinov Assignment, with its significant debt arrangement, does not stand simply on the constitutional provision that the President "shall receive Ambassadors and other public Ministers" (Art. II, Sec. 3). See *United States* v. *Pink*, 315 U.S. 203, 229-230, 240. The historical fact is that the President's general foreign affairs power, rather than some special or limited provision of the Constitution, supplies an important basis

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[66] *Cf.* The Litvinov Assignment, the validity of which was upheld in *United States* v. *Belmont*, 301 U. S. 324, and *United States* v. *Pink*, 315 U. S. 203.

[67] In *United States* v. *Pink*, 315 U. S. 203, 240, the concurring opinion of Mr. Justice Frankfurter stated: "That the President's control of foreign relations includes the settlement of claims is indisputable. * * * The President's power to negotiate such a settlement is the same whether it is an isolated transaction between this country and a friendly nation, or is part of a complicated negotiation to restore normal relations, as was the case with Russia." See also *Monaco* v. *Mississippi*, 292 U. S. 313, 331; Moore, *Treaties and Executive Agreements*, 20 Political Science Quarterly 385, 403-408.

for many arrangements he has made in the last century and a half.[68]

There thus exists a usage, going back to the earliest years of the country, that not all the dealings of the United States with foreign nations have to take the form of treaties and that the President may enter into many types of arrangements in his capacity as the sole organ of the Nation in the field of foreign relations. This constitutional usage, on the basis of which the United States has entered into many scores of Presidential agreements, is indicative of the scope of the President's power. *Ex parte Quirin*, 317 U.S. 1, 42; *Inland Waterways* v. *Young*, 309 U.S. 517; *United States* v. *Midwest Oil Co.*, 236 U.S. 459, 473; *Field* v. *Clark*, 143 U.S. 649, 691. No one, we believe, can review this history, studded as it is with the continued use of executive agreements of many kinds, without concluding that the Court of Appeals' summary disposal of Presidential power wholly ignores our constitutional history.

c. Though this Court has not often had the opportunity to consider executive agreements, it has affirmatively held that the category of "treaty" does not exhaust our arrangements with foreign powers and that the President may conclude executive agreements which are not treaties. In *Altman & Co.* v. *United States*, 224 U.S. 583, 601, the Court

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[68] Others, of course, are based upon specific authorizations to the Executive contained in statutes, *e.g.*, tariff concession agreements are authorized by Section 350 of the Tariff Act of 1930, as amended, 19 U. S. C. 1351.

confirmed the existence of agreements not "possessing the dignity of one requiring ratification by the Senate." In *Monaco* v. *Mississippi*, 292 U.S. 313, 331, it pointed out that the adjustment of claims need not necessarily take the form of treaties. *United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304, 318, unequivocally stated that the foreign relations power of the United States included the authority "to make such international agreements as do not constitute treaties in the constitutional sense." *United States* v. *Belmont*, 301 U.S. 324, 330-331, and *United States* v. *Pink*, 315 U.S. 203, 229-230, likewise upheld the President's power to enter into executive agreements without senatorial participation.[69]

Specifically, an executive agreement entered into by the President pursuant to statutory authority has been held by this Court to have the same status as a treaty for the purpose of applying legislation relating to appeals to this Court (*Altman & Co.* v. *United States*, 224 U.S. 583), and it has been held that the President had power to make, without statutory authorization or Senate participation, the Litvinov Assignment incident to the recognition of the Soviet Union. *United States* v. *Belmont*, 301 U.S. 324, 331-332; *United States* v. *Pink*, 315 U.S. 203, 230.

As in the case of treaties, executive agreements can be modified or overridden, for domestic purposes, by subsequent legislation. *Fong Yue Ting* v. *United States*, 149 U.S. 698, 720; *Maser* v. *United*

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[69] See also *Ozanic* v. *United States*, 188 F. 2d 228, 231 (C. A. 2); *Etlimar S. A.* v. *United States*, 123 Ct. Cls. 552, 572.

States, 341 U.S. 41, 45. And like all other governmental power in the United States, this "very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations * * * must be exercised in subordination to the applicable provisions of the Constitution." *United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304, 320. Together with statutes and treaties, executive agreements are subject to the Bill of Rights and the other clauses of the Constitution [70] which protect all Americans from the excesses of official authority.[71]

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[70] In *United States* v. *Belmont*, 301 U. S. 321, 332, and *United States* v. *Pink*, 315 U. S. 203, 226, the Court assumed that an executive agreement may not violate the Fifth Amendment.

[71] Past practice indicates that international agreements have been cast in the form of treaties or executive agreements, depending upon a number of variables, such as their importance, duration, subject matter, and the degree to which the United States enters into binding commitments. (See 39 Op. A. G. 484, 487). Like most decisions on the distribution of functions between branches of government, the determination of the matters appropriate for an executive agreement calls for informed "political judgment" and does not lend itself to an exact formula. Cf. George Sutherland, *Constitutional Powers and World Affairs*, 121; Arthur E. Sutherland, *Restricting the Treaty Power*, 65 Harv. L. Rev. 1305, 1324, 1329, and the authorities there cited. Frankfurter and Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 Yale L. J. 685, fn. 37, point out that the classification of treaties and compacts under Art. I, Section 3, of the Constitution is based at least in part upon "political judgment." As former Assistant Secretary of State Sayre has said (Sayre, *The Constitutionality of the Trade Agreements Act*, (1939), 39 Col. L. Rev. 751, 755):

> International agreements involving political issues or changes of national policy and those involving interna-

4. *Import restriction agreements like the Potato Agreement.*—Section 22 of the Agricultural Adjustment Act aside, the President clearly has authority to make a commercial arrangement of the type of the Potato Agreement.[72]

a. The fundamental part of the Potato Agreement, the restriction on the movement of potatoes from Canada to the United States in order to prevent interference with the agricultural program in force at that time in this country, was to be enforced primarily by Canada, through its control of one-year's potato crop.[73] In connection with this

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tional arrangements of a permanent character usually take the form of treaties. But international agreements embodying adjustments of detail carrying out well-established national policies and traditions and those involving arrangements of a more or less temporary nature usually take the form of executive agreements.

Foreign countries seem to apply similar tests. Lauterpacht's Oppenheim, *International Law* (7th ed.) Vol. I, Sec. 512; McNair, *The Law of Treaties*, p. 86; Laband, *Staatsrecht des Deutschen Reichs* (5th ed.) Vol. II, pp. 153-155. Art. 59(2) of the Constitution of German Federal (Bonn) Republic expressly provides for "administrative" agreements (Verwaltungsabkommen). The Austrian and Italian Constitutions (Arts. 50 and 80, respectively) require legislative consent to treaties which are of a political nature. The Swiss practice is strikingly similar to the American. See Fleiner-Giacommetti, *Schweizerisches Bundesstaatsrecht*, 825-9.

[72] In this part of the brief, we discuss the validity of the agreement largely as if Congress had not enacted Section 22 as part of the agricultural support programs, and had not concerned itself at all with imports likely to interfere with, or disrupt, such program. We have already discussed the relationship of the Potato Agreement to Section 22, *supra*, at pp. 19-31.

[73] The agreement took effect on November 23, 1948; it was terminated on June 20, 1949 (R. 136).

undertaking by Canada, the United States gave assurances that it would not impose any quantitative limitations or fees on Canadian potatoes of that crop, and that a certain type of Canadian price support system would not lead to the imposition of a countervailing duty by the United States.[74] This is not an agreement of such duration and "national importance" [75] as to be thought to require senatorial advice and consent. On the contrary, it is the typical minor arrangement [76] which should not be required to take up the limited time of the Senate. It may be of interest that the first example historically given by Wolff in 1749 for informal agreements between nations involves a situation akin to the instant one—an arrangement between two states in which

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[74] The commitment not to impose any quantitative restrictions and fees on Canadian potatoes was purely nominal, because Section 22 of the Agricultural Adjustment Act would not come into play in view of Canada's export limitations, and could not, in any case, be employed because of the time required to bring such United States restrictions into operation. *Supra*, pp. 4-5, 31. Moreover, sub-section (f) of Section 22, as it was then worded, would have prevented the invocation of the Section in a manner contrary to the Agreement. See *supra*, pp. 29-30. The provision not to invoke countervailing duties merely represented an interpretation of Section 303 of the Tariff Act of 1930 as not covering the type of payments involved under the specified Canadian price support system.

[75] Cf. Tucker's *Blackstone's Commentaries*, Vol. I, App. 309-310, fn. 58, *supra*, p. 42.

[76] The agreement certainly was microscopic as compared to the Hull-Lothian agreement, discussed in 39 Op. Atty. Gen. 484, and the "Gentlemen's Agreement" on immigration with Japan, *supra*, p. 45.

> * * * one nation permits another, on account of the high price of grain, to purchase in its territory.[77]

The making of Presidential agreements of this kind also has the support of domestic history. General commercial arrangements by the President go back to the early 19th Century. See Sayre, *op. cit.* fn. 71, *supra,* at pp. 770-771. For well over sixty years there have been agreements specifically dealing on a reciprocal basis with certain matters relating to imports, duties, and customs procedures. *Supra,* pp. 23-25, and Appendix B, *infra,* pp. 81-97. This has been a well-marked area in which Presidents have not hesitated to make international commitments.

In addition, it is significant that instances of co-

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[77] Wolff, *Jus Gentium,* Sec. 369 (Carnegie ed.) Vol. 2, p. 191. We do not know whether and to what extent Wolff's writings were known in this country at the time of the Constitutional Convention. Madison refers to him in 1793 in the *Helvidius Papers, 1 Madison, Letters and Writings,* 614. And it was Vattel's avowed purpose to popularize the ideas of Wolff which led him to write his book on the Law of Nations (*supra,* pp. 41-43). See Vattel, *Law of Nations* (Carnegie ed.) Vol. 3, pp. vii-ix and 6a-10a, and Nussbaum, *A Concise History of the Law of Nations* (Rev. Ed.) 156.

That the present-day distinction between treaties and lesser agreements cannot be traced beyond Wolff and Vattel, who wrote in the middle of the 18th century, is probably due to the fact that nonpolitical arrangements were comparatively rare prior to that period. Nussbaum, *Concise History of the Law of Nations* (Rev. Ed.) 32, 127, 138, 203; Louter, *Le Droit International Public Positif* (1920), Vol. I, p. 512; Baron de Nolde, *Droit et Technique des Traites de Commerce, Academie de Droit International* (Hague Academy of International Law) *Recueil des Cours* (1924) Vol. II, pp. 291, 299-313.

operation and adjustment between neighboring states in nonpolitical matters are typical in the use of the compact device.[78] The first Postal Agreement under the Post Office Act of 1792 [79] was concluded with Canada [80] and the Report of Secretary of State John W. Foster to President Harrison [81] shows the extent to which our neighborly relations with that country have been carried out by informal agreement. The most famous incidents are the Rush-Bagot Agreement of 1817, limiting naval armaments in the Great Lakes, which was submitted to the Senate merely out of "abundant caution", almost a year after its terms actually had been carried out,[82] and the cession to the United States in 1850 of Horse Shoe Reef in the Niagara River.[83]

Taking into account the short term of the agreement, its limited scope, past practice in this field of commercial understandings, and the circumstance that the agreement constitutes an attempt to adjust an economic, nonpolitical problem with a neighboring country, we submit that it falls far short of the important longer-term political arrangements

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[78] Cf. Frankfurter and Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 Yale L. J. 685, 694, 695-708, 717-718.

[79] *Supra*, p. 44.

[80] McClure, *Executive Agreements*, 39.

[81] Sen. Ex. Doc. No. 9, 52d Cong., 2d Sess., especially 11, 13-14; see also H. Doc. No. 471, 56th Cong., 1st Sess.

[82] Malloy, Treaties I, p. 628; Sen. Ex. Doc. No. 9, 52d Cong., 2d Sess., p. 11; McClure, *Executive Agreements*, 31.

[83] Malloy, Treaties I, p. 663; Sen. Ex. Doc. No. 9, 52d Cong., 2d Sess., pp. 13-14; McClure, *Executive Agreements*, 70-71.

which, as "treaties", involve the participation of the Senate.

b. The Commerce Clause does not prevent the President from entering into an arrangement like the Potato Agreement. The court below apparently felt (R. 167-168) that the President was without authority because, under Art. I, Section 8, par. 3, of the Constitution, the field of foreign commerce is within the jurisdiction of Congress. But there is no principle of constitutional law that the power of Congress to legislate on certain matters under the Constitution excludes those subjects from the reach of the foreign relations power. No one would deny that this is true where a treaty is involved (see e.g., *Nishimura Ekiu* v. *United States*, 142 U. S. 651, 659).[84] From the beginning, treaties have dealt with matters—including foreign commerce, navigation, tariffs, immigration—on which Congress may and does legislate; the foreign relations power would be virtually nonexistent if it were barred from all those areas in which Congress can and does act. As Mr. Justice Sutherland said in his *Constitutional Powers and World Affairs*, at 150: "But the mere fact that Congress is authorized to legislate upon a particular subject does not, in my judgment, remove it from the jurisdiction of the treaty-making power * * *".

Presidential authority to conclude agreements is as integral a part of the foreign relation power

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[84] The argument was rejected as early as 1796. Story, *Commentaries on the Constitution of the United States* (5th ed.) Vol. II, Sec. 1841.

as is treaty-making (*supra*, p. 35 ff.). Congressional authority is normally limited to American territory where aliens are involved,[85] and this geographical limitation is one of the important reasons for the existence of the foreign relations power. As the Court said in *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 318:

> * * * Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens (see *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347, 356); and operations of the nation in such territory must be governed by treaties, international understandings and compacts, and the principles of international law.

The foreign relations power—whether exercised through treaty or through Presidential agreement—is therefore a necessary concomitant of Congressional power under our constitutional system. In reality, when the subject matter is in a field such as "foreign commerce," the two powers, executive and legislative, are coordinate and concurrent.[86]

The concurrent nature of these powers has been recognized for many years in actual practice with

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[85] *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347, 356; *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 318; *United States* v. *Belmont*, 301 U. S. 324, 332; *United States* v. *Pink*, 315 U. S. 203, 226; *Foley Bros.* v. *Filardo*, 336 U. S. 281, 285; *United States* v. *Spelar*, 338 U. S. 217, 222; cf. *Steele* v. *Bulova Watch Co.*, 344 U. S. 280.

[86] *Chicago & Southern Air Lines* v. *Waterman S. S. Co.*, 333 U. S. 103; *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304,

respect to executive agreements. Authority to adjust claims by or against the United States is a recognized Congressional power, but the President's competence to make such settlements in the international sphere has never been doubted, at least when the United States is the beneficiary. See *e.g., United States* v. *Pink*, 315 U. S. 203, 240 (concurring opinion), *supra*, p. 46, fn. 67. The same is true of certain agreements relating to boundary matters, arrangements as to fishing rights, passport and immigration agreements, and several other fields in which executive agreements have been made.[87]

In particular, this Court has repeatedly recognized that the foreign relations power of the President exists and has vitality in the field of foreign commerce, despite the power of Congress to legislate in this field. *United States* v. *Curtiss-Wright Corp.* 299 U. S. 304, 320; *Knauff* v. *Shaughnessy*, 338 U. S. 537, 542; *Chicago & Southern Air Lines* v. *Waterman Corp.*, 333 U. S. 103, 109; *Fong*

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[87] In a letter to Senator Bricker of Ohio, dated February 26, 1954, the State Department listed some 255 presidential agreements as examples of arrangements made in pursuance of the policy and purpose of Congressional legislation, but which were not specifically authorized by the legislation. The categories listed in the letter included agreements as to the Inter-American highway, taxation, missions of various kinds, civil defense, air navigation, pilot licenses, airworthiness, meteorological services, shipping, exchange of official publications, stockpiling, passport visa fees and tariffs and trade. All of these agreements were in fields of Congressional power, and their validity would be open to question, at the least, if the President were powerless to make agreements (without specific authorization) in such fields.

Yue Ting v. *United States*, 149 U. S. 698, 711-713.[58] Thus, in instances in which Congress had delegated part of its powers over foreign commerce to the President, the Court has recognized that the President's authority was derived not solely from the Congressional delegation but also from his own foreign relations powers (*Chicago and Southern Air Lines* v. *Waterman Corp., supra*, at 109-110):

> Congress may of course delegate very large grants over foreign commerce to the President. * * * The President also possesses in his own right certain powers conferred by the Constitution on him as Commander-in-Chief and as the Nation's organ in foreign affairs. For present purposes, the order draws vitality from either or both sources.

In other words, it cannot be said, as the court below appears to do, that the grant by the Constitution of the commerce power to Congress automatically excludes the field of commercial regulation from the reach of the President's foreign relations power. Commercial executive agreements like the Potato Agreement cannot, therefore, be considered invalid merely because they touch on a subject Congress could regulate.

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[58] See also Mr. Justice Frankfurter, quoting in his concurring opinion in *Youngstown Co.* v. *Sawyer*, 343 U. S. 579, 597, from the dissenting opinion of Mr. Justice Holmes in *Springer* v. *Philippine Islands*, 277 U. S. 189, 209: "The great ordinances of the Constitution do not establish and divide fields of black and white."

II

The United States Is a Third Party Beneficiary of the Contract Made Under the Potato Agreement by Respondent and the Canadian Exporter, and May Recover the Damages It Suffered as a Result of the Breach of This Contract

Respondent promised ~~his~~ Canadian exporter that the seed potatoes loaded on the *S. S. Gangway* were for planting in Florida and Georgia, and it knew that this obligation on its part was required by the Potato Agreement. *Supra,* p. 7. The Agreement bound Canada not to license exports to the United States unless the American importer gave an assurance that the potatoes would not be diverted or reconsigned for table stock purposes. This was an integral part of the Agreement, designed to carry out the policy of Section 22 of the Agricultural Adjustment Act to prevent interference by foreign imports "whenever the President has reason to believe that any article or articles are being or are practically certain to be imported into the United States under such conditions and in such quantities as to render or tend to render ineffective, or materially interfere with" a subsidy program. *Supra,* pp. 4, 30-31.

A. *The United States may enforce the potato subsidy program through contracts for the benefit of itself as third party.*

The court below conceded that the United States was the beneficiary of a contract for the benefit of a third party (R. 166, 169) and "had little diffi-

culty in seeing * * * breach of contract on the part of defendant and damage resulting to the United States from the breach" (R. 166). Nevertheless, it held that no action could be maintained for the breach of this promise in the absence of express authorization by Congress (R. 169).[89]

This ruling disregards the well established rule that no specific statutory authorization is required for the judicial enforcement of the contractual or other property rights of the United States. The Court held, as early as 1818, that no statute was required to enable the United States to recover for a breach of contract, since "It would be strange, to deny them [i.e., the United States] a right which is secured to every citizen". *Dugan* v. *United States*, 3 Wheat, 172, 181. *Cotton* v. *United States*, 11 How. 229, 231-232, reasserted the classic principle that "as a corporation or body politic [the United States] may bring suits to enforce their contracts and protect their property" (11 How. at 231). See also *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 550; *United States* v. *Standard Oil Co. of California*, 332 U.S. 301, 315, fn. 22. This rule clearly covers actions on express contracts and

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[89] The decision below does not indicate clearly whether this ruling presupposes that the Potato Agreement is valid or whether it addresses itself solely to the theory that the respondent's promise might be enforceable irrespective of the validity of the Potato Agreement (cf. the beginning of the first paragraph in R. 169). Our argument on this Point assumes that the court held respondent's promise unenforceable even if the Potato Agreement is valid (cf. Pet. 2, 24).

also the numerous kinds of cases in which the Government is permitted to maintain actions based on various quasi-contractual obligations or contracts implied in law. Examples are, among many, the right of the United States to recover money paid by it under mistake of law or fact (e.g., *Wisconsin C. R. R. Co.* v. *United States,* 164 U.S. 190), and the right of the United States as drawee of a check to recover money paid on a forged endorsement. E.g., *Clearfield Trust Co.* v. *United States,* 318 U.S. 363; *United States* v. *National Exchange Bank,* 214 U.S. 302. On the same theory, there is nothing inherently anomalous in contracts for the benefit of third parties which would justify the denial to the United States of the generally recognized right of the third party to enforce the breach of a promise.

Nor is the principle of the *Dugan* and *Cotton* cases any less applicable because they supposedly involved situations in which the United States acted in a "proprietary" capacity while this case involves "governmental" activities (R. 169). The distinction between governmental and proprietary activities does not apply to the United States, every activity of which is of a governmental nature. *Graves* v. *New York ex rel. O'Keefe,* 306 U.S. 466, 477; *Federal Land Bank* v. *Bismarck Lumber Co.,* 314 U.S. 95.[30] Moreover, it should be noted that

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[30] *Cotton* v. *United States,* 11 How. 229, has been cited subsequent to the *Graves and Bismarck Lumber Co.* cases, thus indicating that in this Court's view the *Cotton* and related cases are not limited to those instances in which the United States "stands in the shoes of a private person" (cf. R. 169). See *United States ex rel. Marcus* v. *Hess,* 317 U. S. 537, 550;

Section 22 is designed, at least to a large extent, to protect the fiscal interests of the United States by limiting imports which would increase the cost of the price support program (*supra*, pp. 3-4, 20 ff.). It can be shown, in this very instance, that the breach of contract cost the Government a substantial sum of money (*supra*, pp. 8-9; *infra*, pp. 71-75).

United States v. *Standard Oil Co. of California*, 332 U.S. 301, relied upon by the court below (R. 169-170), does not hold to the contrary. The question there presented was whether the Court should expand, by way of analogy, the tortfeasor's liability to an employer for loss of his injured employee's service to a situation to which it had not applied before—the relationship between the United States and its military personnel. The Court refused to create what it considered to be a new cause of action *in consimili casu* without congressional sanction; it pointed out, however (332 U.S. at 315), that no statutory authorization is required where the United States merely seeks to enforce a traditional remedy. Similarly, *United States* v. *Gilman*, 347 U.S. 501, dealt with the special and complex relationship of the Federal Government to its employees, and the Court again distinguished cases involving "an established type of liability" (347 U.S. at 509) as not requiring specific sanction. Here, on the other hand, the United States asks enforcement of a recognized contractual right—

United States v. *Standard Oil Co. of California*, 332 U. S. 301, 315.

third-party beneficiary liability [91]—not the creation of a new remedy, and there is no such special relationship as that between sovereign and soldier or government and employee.

United States v. *LeRoy Dyal Corp.*, 186 F. 2d 460 (C.A. 3), certiorari denied, 341 U.S. 926, involved an analogous situation, *i.e.*, the breach of a contract entered into (in connection with an earlier potato price support program) between the Commodity Credit Corporation and a potato dealer, in which the latter agreed not to purchase potatoes from a farmer who was not an eligible dealer. While the main issue was whether a liquidated damage clause was enforceable or constituted a penalty, the court had no difficulty in finding that the defendant was "liable according to his agreement for breaking a contract voluntarily entered into" (186 F. 2d 464), and in judicially enforcing that liability.[92]

Not only does the *LeRoy Dyal* case uphold the right of the United States to resort to the courts for enforcement of contracts implementing a subsidy program, but it also affirms the Government's

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[91] The court below, fully realizing that the liability of a third party beneficiary is of a traditional character, apparently felt that the contents of respondent's undertaking were unprecedented and therefore confused the enforcement of a new type of promise with the creation of a new cause of action (R. 169).

[92] And see *United States* v. *Carpenter*, 113 F. Supp. 327 (E. D. N. Y.), involving a situation identical with the one at bar, where the court enforced the importer's promise for the benefit of the United States.

substantive right to take advantage of contractual stipulations to carry out these programs. This principle is just as firmly established as that which permits judicial enforcement. So long as it does not contravene Congressional requirements or violate public policy, the United States is free to make contracts within the sphere of its constitutional powers, although not expressly directed or authorized to do so by Congress. *United States* v. *Tingey*, 5 Pet. 115, 127-8; *United States* v. *Bradley*, 10 Pet. 343, 360; *United States* v. *Linn*, 15 Pet. 290, 311; *United States* v. *Hodson*, 10 Wall. 395, 406-8; *Van Brocklin* v. *Tennessee*, 117 U.S. 151, 154; cf. *United States* v. *Moorman*, 338 U.S. 457. Once it is recognized that the Potato Agreement is valid, there can be no question that its policy (as well as that of Section 22) can be enforced by means of a contractual obligation even though Congress has not expressly told the Government that it may use this device.[93]

B. *Respondent made an enforceable promise for the benefit of the United States, which has been breached to the Government's damage.*

After having raised the issues of the validity of the Executive Agreement and of the enforceability of a promise benefiting the United States without

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[93] The *Carpenter* case, fn. 92, *supra*, holds that the contractual mechanism is valid and the purchaser bound to the United States, even if the Potato Agreement were invalid. There is much to be said for this position and we do not disavow it.

specific statutory sanction in its motion to dismiss (R. 9-10) and again in its answering brief in the Court of Appeals, respondent now seems to complain that the court below was unduly avid to reach those broad questions (Br. in Opp., p. 5), and seeks to avoid liability on what are essentially factual and technical legal grounds. Its main positions now appear to be that (a) its promise did not come within the scope of those which are enforceable at a third party's instance, in particular because it was governed by the law of Canada which does not recognize contracts for the benefit of third parties; (b) respondent has not violated its contract; and (c) if there was a breach, the United States has not suffered any damages nor proved its damages by legally competent evidence. We submit that both courts below properly held that respondent had made a promise for the benefit of the United States (R. 13-16, 166-169), and that the Court of Appeals did not commit error in holding that there was evidence on the basis of which the jury could have found "breach of contract on the part of defendant [respondent] and damage resulting to the United States from the breach" (R. 166).

1. *Respondent made a promise for the benefit of the United States.*—The decisions of both lower courts were rested on the fundamental understanding that respondent's telegram to its Canadian seller [94] was contractual in nature (R. 15, 147-148,

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[94] "Certified seed potatoes loaded on *S. S. Gangway* are for planting in Florida and Georgia" (*supra*, p. 7).

165-166). These concurrent findings are not vitiated by such exceptional error as to call for review here or justify reversal. *Faulkner* v. *Gibbs*, 338 U.S. 267, 268; *Comstock* v. *Group of Institutional Investors*, 335 U. S. 211, 214. Respondent itself does not deny that its telegram was of a contractual character; it merely questions whether it contained a promise enforceable by the United States as a third party. Aside from the contention (discussed *supra*, pp. 58-63) that the United States has a special status barring it from seeking judicial enforcement, respondent's arguments are chiefly that the contract is governed by Canadian law which does not recognize contracts for the benefit of third parties, and, in any event, that under the law prevailing in the United States this is not the type of promise for the benefit of a third party which is capable of judicial enforcement.

a. (i) The short answer to the first contention is that contracts for the benefit of third parties are enforceable in Canada by way of a suit in equity. *Moot* v. *Gibson*, 21 Ont. Rep. 248; *Vandepitte* v. *Preferred Acc. Ins. Co.* [1933], 1. Dom. Law Rep. 289, 291 (Privy Council); *Margolius* v. *Kellner & Diesbourg* [1937], 2 Dom. 145, 150-152 (Sup. Ct. of Canada).[95] In view of the merger of law and equity

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[95] For the virtual identity of the law of third-party beneficiaries in the United States and England and Canada, as a matter of result if not of theory, see Corbin on *Contracts*, Vol. IV, Secs. 838-854. Similarly, 12 Am. Jur., *Contracts*, Sec. 275 (pp. 822-823), referred to in respondent's Brief in Opposition (p. 17), concludes that the tendency under the English rules seems to be to permit a recovery by the beneficiary under a

in the federal courts (Rule 1, Federal Rules of Civil Procedure), this procedural distinction, observed in Canada, cannot bar the enforcement of the claim in the federal courts by way of a "civil action" which comprises both actions at law and proceedings in equity (Rule 2, Federal Rules of Civil Procedure).

(ii) Respondent's reliance upon Canadian law is based upon the theory that the laws of that country apply as the law of the place where the contract was made. If the place of making is significant, we suggest that the contract was made in the State[96] from which the telegram agreeing to limit the use of the potatoes for seed purposes was sent.[97] It is, however, by no means certain that respondent's promise is governed by the law of the place of making. The place of performance[98] would appear to be more closely related to the issues of respondent's promise and its breach than the fortuitous place from which the telegram of acceptance was sent, or the particular Canadian prov-

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trust theory in the same circumstances as the contract would be enforceable in the United States.

[96] The record does not indicate from where the telegram was sent (R. 151). It may, however, be safely assumed that it originated either in Virginia, where respondent's main office is located (R. 150, 158, 165), or in Florida, the location of the subsidiary to which the instant shipment of potatoes was consigned (R. 151).

[97] Cf. Restatement of the Law of Contracts, Section 64; Williston, on *Contracts* (Rev. Ed.), Section 81; Restatement of the Law of Conflicts of Laws, Sections 325, 332.

[98] Georgia or Florida (R. 151).

ince [99] in which the potatoes happened to be purchased.[100]

Moreover, such questions as whether the assurances required to be given under the Potato Agreement (R. 154) are enforceable should be decided uniformly, rather than dependent upon the laws of the State or country which governs the promise under the applicable rules of private international law. This is a signal instance in which the rights of the United States resulting from "identical transactions" should not be "subject to the vagaries of the laws of the several states." *Clearfield Trust Co.* v. *United States*, 318 U.S. 363, 367. Undertakings of the type given by respondent on the basis of an international agreement "require national disposition rather than diversified state rulings." *United States* v. *Standard Oil Co. of California*, 332 U.S. 301, 307.[101]

Federal law enforces contracts for the benefit of third parties. *Hendrick* v. *Lindsay*, 93 U.S. 143, 149; Corbin, on *Contracts*, Vol. IV, Secs. 830-833; Williston, *Contracts* (Rev. Ed.), Section 368, fn. 1.

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[99] In Quebec, influenced by French law, the Civil Code, Section 1029, expressly provides for the enforcement of contracts for the benefit of third parties. In this case, however, the Canadian exporter was located in Prince Edward Island (R. 151).

[100] Cf. Restatement of the Law of Contracts, Section 358; *Pritchard* v. *Norton*, 106 U. S. 124, 136-141.

[101] Cf. *United States* v. *Allegheny County*, 322 U. S. 174, 183; *Clearfield Trust Co.* v. *United States*, 318 U. S. 363; *National Metropolitan Bank* v. *United States*, 323 U. S. 454; *United States* v. *North Carolina*, 136 U. S. 211, 222; *Girard Trust Co.* v. *United States*, 149 F. 2d 872, 161 F. 2d 159 (C.A. 3).

The same result would seem to follow if the laws of Florida or Virginia were considered applicable either as the place of making or as the place of performance.[102]

b. Respondent's alternative argument is that, granting that the courts enforce some types of contracts for the benefit of third parties, the instant promise does not come within that privileged group. The claim seems to be that petitioner is only an "incidental beneficiary,"[103] or that the contract was not intended for the "direct benefit" of the United States.[104]

This argument completely disregards the realities. Obviously, the United States was primarily interested in the performance of the agreement to limit the use of the potatoes (*supra*, pp. 3-6, 8-9,

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[102] Florida: *American Surety Co.* v. *Smith*, 100 Fla. 1012, 1016; *Bruce Construction Corp.* v. *Federal Realty Corp.*, 104 Fla. 93, 98; *Marianna Lime Products Co.* v. *McKay*, 109 Fla. 275, 278; *Cherry Lake, Inc.* v. *Kearce*, 157 Fla. 484, 487.

Virginia: Virginia Code (1950), § 55-22; *Montague Mfg. Co.* v. *Homes Corp.*, 142 Va. 301; *Horney* v. *Mason*, 184 Va. 253.

The Georgia Code was amended on February 9, 1949, to permit actions at law by third-party beneficiaries. Ga. Code Ann. (Pocket Part), § 3-108. This was shortly after respondent's purchase and resale of the potatoes.

[103] Restatement of the Law of Contracts, Section 147; Corbin, on *Contracts*, Vol. IV, Sec. 779c; Williston, *Contracts* (Rev. Ed.), Sections 402, 403.

[104] Cf. *German Alliance Insurance Co.* v. *Home Water Co.*, 226 U. S. 220, 230; *Robins Dry Dock & Repair Co.* v. *Flint*, 275 U. S. 303, 307-308.

19 ff.), as both courts below have recognized. The District Court found expressly that the (R. 15-16):

> Government is the direct and lone beneficiary of the pledge against diversion. * * * Indeed, in reality it ran to the United States. * * * the immediate parties foresaw the United States as alone enforcing the undertaking.

And the decision of the Court of Appeals was predicated upon the theory that the contract was for the benefit of the United States (R. 168), a method by which to put teeth into the Potato Agreement; the court recognized that it had no purpose apart from that goal (R. 166, 169).

2. *The Court of Appeals properly held that, assuming the enforceability of respondent's promise, the United States sufficiently proved a breach of contract and the resulting damages.*—The District Court directed a verdict in favor of respondent on the grounds that there was no evidence which would justify the jury in finding a breach of contract and that no damages resulting from respondent's action had been shown (R. 148-149). In that posture of the case, the issue before the Court of Appeals was whether or not the United States was entitled to go to the jury. In determining this question, the appellate court must view the evidence in the light most favorable to the appellant, resolve all conflicts of evidence in his favor, and give him the benefit of such favorable inferences as may reasonably be drawn from the facts and circumstances proven. Cf. *Scott* v. *Chicago, Rock Island & Paci-*

fic R. Co., 197 F. 2d 259, 261 (C.A. 8); *Hickman* v. *Jones*, 9 Wall. 197, 201; *Hopkins* v. *E. I. Du Pont de Nemours & Co.*, 199 F. 2d 930, 931 (C.A. 3).

Applying this standard, the Court of Appeals had "little difficulty in seeing in the evidence" a breach of contract and damages resulting therefrom (R. 166). Respondent asks this Court to review this determination of the Court of Appeals (cf. Brief in Opp., pp. 5, 19-26), but we submit that respondent has not produced any exceptional considerations which might justify its request that this Court reevaluate the record and review the decision of the Court of Appeals holding there was evidence which should have gone to the jury. Cf. *National Labor Relations Board* v. *Pittsburgh S. S. Co.*, 340 U. S. 498, 502-503, and the authorities there cited. Moreover, the record plainly supports the court below on this score.

a. There is no doubt that respondent breached its promise. In view of its admission that it was apprized of the Potato Agreement with Canada and its purposes (R. 104) (see *supra*, p. 7, fn. 8), its telegram (R. 151):

> Certified seed potatoes loaded on S. S. *Gangway* are for planting in Florida and Georgia

can only be read as an "assurance that the potatoes would not be diverted or reconsigned for table stock purposes" (R. 154; see also R. 165). This undertaking was plainly breached when respondent sold the potatoes without any limitations on their use.

The argument is made, however, that they were

formally sold to the Atlantic Commission Company as "seed potatoes" (see the invoice, R. 151) and this was a sufficient restriction to comply with respondent's obligation. But the evidence discloses that the Atlantic Commission Company purchased the potatoes, not for seed purposes, but as "potatoes" (R. 62), obviously to be sold for food. And since the Commission Company is a subsidiary of A. & P., a supermarket chain (*supra*, p. 8), respondent can hardly claim that it was enough to put the words "seed potatoes" in the invoice, knowing as it did that "seed potatoes" are edible and are widely eaten (*supra*, p. 6, fn. 5).

The District Court also placed much weight on the evidence that previously respondent had sold potatoes to Atlantic Commission Company exclusively for seed purposes and felt that it had the right to rely upon its previous experience (R. 148). Aside from the difference in quantities and in the purchaser's anticipated use (R. 62), this argument overlooks the circumstance that only about one-fifth of the potatoes on the *Gangway* were suitable for planting in Florida (*supra*, p. 7); and it certainly does not apply to the potatoes which respondent itself sold to groceries, produce companies, and supermarkets (*supra*, p. 8, fn. 10, and see Exh. 4, p. 152).

b. The District Court also erred in not submitting the question of damages to the jury, for the evidence shows that the United States suffered a very substantial loss as the result of respondent's breach of contract. Taking the figures most favor-

able to respondent, it imported 48,544 bags of potatoes (Exh. 1, pp. 150-151) of which only 10,581 were of a type suitable for planting in Florida (R. 101); some 12,800 bags were sold to purchasers in Alabama and Georgia (R. 152, 159-161). Hence, it appears that at least some 25,500 cwt. of potatoes unsuitable for planting in Florida, but well suited for table purposes (R. 51, 63, 82), remained in that State and were sold to grocers and similar establishments (R. 152, 159-161). We submit that these circumstances, in themselves,[105] would justify a finding by the jury that a minimum of 25,000 cwt. of potatoes had been "diverted or reconsigned for table stock purposes" (cf. R. 154), that they were displacing a similar amount of American table potatoes which could have been sold in the Florida market, and that the financial burden of the United States under the Agricultural Adjustment Act has been increased correspondingly.[106]

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[105] Even without the evidence showing that the potatoes were traced into retail stores where they were bought by housewives patently for table purposes alone (R. 23-24, 27-29, 33).

[106] It cannot be said that if respondent had carried out its contract and sold the potatoes for seed purposes an equal amount of American seed potatoes would have been diverted to the table stock market so that the Government would have been subjected to the identical financial burden, regardless of whether respondent had breached or carried out its undertakings. There was a definite demand for Canadian seed potatoes (R. 112-113), and the United States had indicated that it intended to respect this preference (R. 112-113). Thus, compliance with the contract would not have caused the diversion of any American seed potatoes to the table stock market.

Once the "fact of injury" to the United States has been established, respondent cannot escape liability on the ground that the exact amount of the damages was uncertain or ascertainable only by inferential proof (cf. Br. in Opp., pp. 20-22). As this Court pointed out in *Story Parchment Co.* v. *Patterson Co.*, 282 U. S. 555, 562-564:

> It is true that there was uncertainty as to the extent of the damage, but there was none as to the fact of the damage; and there is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage, and the measure of proof necessary to enable the jury to fix the amount. * * *
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> * * * * *
>
> Where the tort [107] itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a

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[107] In *Palmer* v. *Connecticut Railway Co.*, 311 U. S. 544, 558-561, the Court applied this rule to a breach of contract. See also *General Finance Corp.* v. *Dillon*, 172 F. 2d 924, 930 (C. A. 10).

> matter of just and reasonable inference, although the result be only approximate.[108]

To the same effect, see *Bigelow* v. *RKO Radio Pictures*, 327 U. S. 251, cf. *Woolworth Co.* v. *Contemporary Arts*, 344 U. S. 228, 232, and see in general Corbin, on *Contracts*, Vol. V, Secs. 1020 *ff.*

The evidence, summarized above, established that the United States suffered damages in the minimum amount of $68,500;[109] the jury could also have found that none of the 48,544 bags had been sold for seed purposes and the injury suffered by the United States was measured by the average support price paid by the Government in the Jacksonville area in January 1949, *i.e.*, $3.03 (R. 86-90, 157), a total of $147,088.32—a figure very close to the one asked for in the complaint ($150,486) (R. 4). In these circumstances, the United States should not "be barred from a fair recovery[110] by impossible requirements. The wrongdoer[111] should not * * *

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[108] The opinion also quotes with approval from Judge Christiancy's ruling in *Allison* v. *Chandler*, 11 Mich. 542, 555: "Juries are allowed to act upon probable and inferential, as well as direct and positive proof. And when, from the nature of the case, the amount of the damages cannot be estimated with certainty, or only a part of them can be so estimated, we can see no objection to placing before the jury all the facts and circumstances of the case, having any tendency to show damages, or their probable amount; so as to enable them to make the most intelligible and probable estimate which the nature of the case will permit."

[109] *I.e.*, the necessity of having to purchase an additional 25,000 bags of potatoes at an average support price of $2.74 (R. 92).

[110] An excessive verdict would be subject to judicial control. Cf. *Bucher* v. *Krause*, 200 F. 2d 576, 586 (C. A. 7).

[111] As pointed out *supra* (fn. 107), the wrong in the *Palmer* case was a breach of contract.

be permitted to escape under cover of a demand for nonexistent certainty." *Palmer* v. *Connecticut Ry. Co.*, 311 U. S. 544, 560-561.

CONCLUSION

For the above reasons, it is respectfully submitted that the judgment of the court below should be reversed and the cause be remanded to the District Court for a new trial.

SIMON E. SOBELOFF,
Solicitor General.
J. LEE RANKIN,
WARREN E. BURGER,
Assistant Attorneys General.
OSCAR H. DAVIS,
Special Assistant to the Attorney General.
PAUL A. SWEENEY,
HERMAN MARCUSE,
MARCUS A. ROWDEN,
Attorneys.

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APPENDIX A

CONSTITUTIONAL AND STATUTORY PROVISIONS

(a) *Constitution.*

Art. I, Section 8, par. 3, provides:

> Section 8. The Congress shall have the Power * * *
>
> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

Art. I, Sec. 10, pars. 1 and 3, provide in pertinent part:

> SECTION 10. No State shall enter into any Treaty, Alliance or Confederation; * * *.
>
> No State shall without the Consent of Congress * * * enter into any Agreement or Compact with another State, or with a foreign power * * *.

Art. II, Section 2 provides in pertinent part:

> He [the President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; * * *.

(b) Section 22 of the Agricultural Adjustment Act, as amended by Section 3 of the Agricultural Act of 1948 (62 Stat. 1249, 7 U. S. C. 624), provided in November 1948:

> SEC. 22. (a) Whenever the President has reason to believe that any article or articles

are being or are practically certain to be imported into the United States under such conditions and in such quantities as to render or tend to render ineffective, or materially interfere with, any program or operation undertaken under this title or the Soil Conservation and Domestic Allotment Act, as amended, or section 32, Public Law Numbered 320, Seventy-fourth Congress, approved August 24, 1935, as amended, or any loan, purchase, or other program or operation undertaken by the Department of Agriculture, or any agency operating under its direction, with respect to any agricultural commodity or product thereof, or to reduce substantially the amount of any product processed in the United States from any agricultural commodity or product thereof with respect to which any such program or operation is being undertaken, he shall cause an immediate investigation to be made by the United States Tariff Commission, which shall give precedence to investigations under this section to determine such facts. Such investigation shall be made after due notice and opportunity for hearing to interested parties, and shall be conducted subject to such regulations as the President shall specify.

(b) If, on the basis of such investigation and report to him of findings and recommendations made in connection therewith, the President finds the existence of such facts, he shall by proclamation impose such fees not in ex-

cess of 50 per centum ad valorem or such quantitative limitations on any article or articles which may be entered, or withdrawn from warehouse, for consumption as he finds and declares shown by such investigation to be necessary in order that the entry of such article or articles will not render or tend to render ineffective, or materially interfere with, any program or operation referred to in subsection (a), of this section, or reduce substantially the amount of any product processed in the United States from any such agricultural commodity or product thereof with respect to which any such program or operation is being undertaken: *Provided*, That no proclamation under this section shall impose any limitation on the total quantity of any article or articles which may be entered, or withdrawn from warehouse, for consumption which reduces such permissible total quantity to proportionately less than 50 per centum of the total quantity of such article or articles which was entered, or withdrawn from warehouse, for consumption during a representative period as determined by the President: *And provided further*, That in designating any article or articles, the President may describe them by physical qualities, value, use, or upon such other bases as he shall determine.

(c) The fees and limitations imposed by the President by proclamation under this section and any revocation, suspension, or modifica-

tion thereof, shall become effective on such date as shall be therein specified, and such fees shall be treated for administrative purposes and for the purposes of section 32 of Public Law Numbered 320, Seventy-fourth Congress, approved August 24, 1935, as amended, as duties imposed by the Tariff Act of 1930, but such fees shall not be considered as duties for the purpose of granting any preferential concession under any international obligation of the United States.

(d) After investigation, report, finding, and declaration in the manner provided in the case of a proclamation issued pursuant to subsection (b) of this section, any proclamation or provision of such proclamation may be suspended or terminated by the President whenever he finds and proclaims that the circumstances requiring the proclamation or provision thereof no longer exist or may be modified by the President whenever he finds and proclaims that changed circumstances require such modification to carry out the purposes of this section.

(e) Any decision of the President as to facts under this section shall be final.

(f) No proclamation under this section shall be enforced in contravention of any treaty or other international agreement to which the United States is or hereafter becomes a party.

(c) Section 1 (b) of the Agricultural Act of 1948 (62 Stat. 1247) provides:

> SECTION 1. Notwithstanding any other provision of law, the Secretary of Agriculture is authorized and directed through any instrumentality or agency within or under the direction of the Department of Agriculture, by loans, purchases, or other operations * * *.
>
> * * * * *
>
> (b) To support until January 1, 1950, a price to producers of commodities with respect to which the Secretary of Agriculture by public announcement pursuant to the provisions of the Act of July 1, 1941, as amended, requested an expansion of production of not less than 60 per centum of the parity or comparable price therefor nor more than the level at which such commodity was supported in 1948, except that Irish potatoes harvested before January 1, 1949, milk and its products, hogs, chickens, and eggs shall be supported at 90 per centum of the parity or comparable price. The comparable price for any such commodity shall be determined and used by the Secretary for the purposes of this subsection if the production or consumption of such commodity has so changed in extent or character since the base period as to result in a price out of line with parity prices for the commodities referred to in (a) hereof. In carrying out the

provisions of this subsection the Secretary of Agriculture shall have the authority to require compliance with production goals and marketing regulations as a condition to eligibility of producers for price support.

APPENDIX B

Executive Agreements Differing from Legislation on Foreign Commerce

Agreements relating to Tariff Act of 1890

During the consideration of the Tariff Act of 1890 by the Congress Secretary of State Blaine had attempted, in both the House of Representatives and the Senate, to secure the incorporation of provisions authorizing the conclusion by the President of "reciprocity agreements" under which rates of duty might be reduced by the Executive as a result of negotiations with particular countries in return for concessions obtained from those countries (U. S. Tariff Commission, Reciprocity and Commercial Treaties, p. 145 to 148). As passed, the act contained no such authorization for, or even reference to, agreements by the executive. Section 3, however, provided that with a view to securing "reciprocal trade" the President "shall have the power and it shall be his duty to suspend, by proclamation", the duty-free treatment provided for sugar, molasses, coffee, tea or hides produced in countries which treated United States commerce in

an "unequal or unreasonable" manner (26 Stat. 612).

About a month after enactment of this law Secretary Blaine wrote to the Brazilian Minister that he would be happy to establish commercial relations between the two republics "on a permanent basis of reciprocity, profitable alike to both", and inquired what changes Brazil would be willing to make in its tariff duties in response to the favorable changes made by the United States in the 1890 Act (For. Rel. 1891, p. 43, 44). He declared that if the Brazilian Government would give specified treatment to named United States products, it "may be assured that no export tax, whether national, State, or municipal, will be imposed upon such products or manufactures in the United States". This proposal was accepted by the Minister, who listed the concessions which would be granted to the United States, and gave a comparable undertaking with respect to the freedom from export taxes of products listed in the United States note as free of duty when imported into the United States (ibid., 44-46). These concessions were found satisfactory, and Secretary Blaine, stated that he had been directed by the President that the latter "accepts this action of the government of Brazil . . . as due reciprocity for the action of the Congress of the United States" in the 1890 Act (ibid., 46, 47). Although the notes reserve the right of the two governments to take action "necessary to protect the revenue and prevent fraud in the declarations and proof", both Governments undertook

that, "The laws and regulations to be adopted shall place no undue restrictions on the importer nor impose any additional charges or fees . . . upon the articles imported". The substance of this agreement was recited in a proclamation by President Harrison, with a statement that assurances had been given that the Brazilian action "is accepted as due reciprocity for the action of Congress" (26 Stat. 1563, 2654). Altogether 14 agreements quite comparable to that with Brazil were concluded.

Notwithstanding that the statute contained no authorization for agreements by the Executive, and had even been passed in lieu of a proposal by the Secretary of State which would have authorized such agreements, Secretary Blaine chose to operate very largely by the method of obtaining agreement from other countries to give specified treatment, in return for an understanding that the United States would not invoke the permissible retaliatory provisions of the statute. In fact, in return for concessions on specified United States products, he agreed not to take the retaliatory action contemplated by the provisions of the statute even though the other country might subsequently impose on different United States products duties which would be "unreasonable or unequal" within the meaning of such provisions. Moreover, Secretary Blaine did not limit the undertaking by the United States to the matter of the duty-free treatment of the named products, but undertook that neither federal, state, nor municipal export taxes would be imposed on

products on which Brazil granted concessons (undoubtedly such state or municipal taxes were prohibited by the Constitution), and gave assurances with respect to the application of "laws and regulations" and "additional charges or fees" with respect to enforcement provisions of the customs laws.

One of the best known of the agreements in this series relating to the 1890 Act, sometimes referred to as the "Saratoga Convention", was concluded with Germany (Sen. Exec. Doc. 119, 52d Cong., 1st Sess., p. 110). In this agreement Germany undertook to extend to the United States tariff concessions being negotiated with Austria-Hungary, and to remove the prohibition on the importation into Germany of hogs, pork, and sausage. In his reply note Mr. John W. Foster, Special Envoy for the United States, gave assurances that the former action was accepted "as due reciprocity for the duty free treatment provided" for the named products in the Tariff Act of 1890, and that the latter action "will remove the occasion for the exercise . . . of the power conferred" by section 5 of the meat inspection law of August 30, 1890 (26 Stat. 415 and 416). Section 5 of the latter law, which made no reference to international agreements, provided that when the President is "satisfied that unjust discriminations" were made by any country "against the importation or sale or any product of the United States he may direct" that such products as he deems proper of such country may

be excluded from importation into the United States.

The Tariff Act of 1894 repealed section 3 of the 1890 law, and added "but nothing herein contained shall be held to abrogate, or in any way affect, such reciprocal commercial arrangements as have heretofore been made and now exist between the United States and foreign countries, except where such arrangements are inconsistent with the provisions of this Act" (sec. 71, 28 Stat. 569). This provision clearly recognizes the existence of valid agreements concluded under section 3, notwithstanding the fact that the Executive in concluding such agreements had adopted a method of obtaining reciprocal concessions different from that provided for in the statute.[1]

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[1] The rather extensive debate in the Senate on what became of this provision is interesting (26 Cong. Rec. 6981 to 7000, 7110). An earlier version of the section had provided specifically for the abrogation of the agreements. The language which was subsequently enacted was proposed by Senators who felt the agreements desirable but who realized that the imposition of a duty on sugar by the 1894 Act, which seemed likely, would have the effect of preventing the United States from giving effect to the agreements since sugar was the most important product involved in them (explanations by Sens. Allison, ibid., 6986, and Vest, ibid., 6988). While some Senators seemed to see in section 3 of the 1890 Act an implied authorization to the executive to conclude agreements, Senator Gray pointed out emphatically that the Act contained no language of authorization, and that any action taken by the President had been taken "upon the authority of the executive alone" (ibid., 6991). Senator Gray was the only Senator in the rather long debate who questioned the legal validity of the President's action, although his principal point was that repeal of the 1890 Act did not take away any power to make

Agreements under the Tariff Act of 1897

Section 3 of the Tariff Act of 1897 authorized the President to "enter into negotiations . . . with a view to the arrangement of commercial agreements" in which concessions would be obtained for the United States, and during the continuance of such concessions to suspend by proclamation the ordinary duties on certain listed products (30 Stat. 203, 204). Under this Act the President concluded 15 agreements.

Certain of these agreements departed from the simple authorization provided by Congress and contained broader provisions not referred to in the legislation on which they were based. For instance, the 1907 agreement with Germany, which was signed by Secretary of State Root, included undertakings by the United States with respect to the modification of "customs and consular regulations" relating to the definition of dutiable value, to the conduct of proceedings by the Board of Appraisers (subsequently became the United States

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agreements as the Act had not conferred any such power (ibid., 6993).

Senator Sherman, in discussing the inconsistency between the proposed legislation and the agreements, and in arguing that the procedures for termination should be left to the President as a result of negotiation, pointed out that "an Act of Congress can abrogate a treaty", undoubtedly referring to its domestic effect (ibid., 6987). He considered a comparable situation to exist with respect to these agreements, which should be the subject of negotiation and adjustment between the governments involved, and added that, "By our constitution the President is the only officer who can deal with foreign nations, and he ought to have the full power to make or change a treaty or a reciprocal agreement."

Customs Court), to the documentation to be given to consular officers in connection with importation, to the cooperation of special Treasury agents with Chambers of Commerce in Germany, and to the acceptance by customs appraisers of certificates of value issued by such chambers (1 Treaties (Malloy) 563 to 578). In at least one instance, instead of limiting the commitment of the United States not to discriminate to the products with respect to which the statute authorized the lower duties, the agreement provided, generally, that the United States would give most-favored-nation treatment with respect to "commerce" (agreement of 1906 with Bulgaria, 100 Brit. For. State Papers 826; For. Rel. 1906, pt. 1, p. 141, 142; 34 Stat. (pt. 3) 3231).

Thus, in this early case in which Congress set forth a plan for agreements relating to specified matters of foreign commerce, the executive concluded agreements departing from the legislative plan and undertook commitments for which no authorization had been given. While the agreements did not conflict with the congressional enactments they went beyond the scope thereof.

1910 Agreement with Portugal

The Tariff Act of 1909 provided for differential tariff rates, the lower rates to be made applicable by proclamation to those countries which the President found were not discriminating against the United States (sec. 2, 36 Stat. (pt. 1) 82, 83). While this provision was in effect, and in addition

to proclamations relating to Portugal issued under it by President Taft (36 Stat. (pt. 2) 2519, 2520, 2543 to 2545), an agreement was signed with Portugal by Acting Secretary of State Huntington Wilson by which the United States undertook, in return for similar undertakings by the Portuguese Government, "that the subjects, merchandise, and ships of Portgual and her possessions will be treated in the United States of America in the same manner as those of the most favored nations" (3 Treaties (Redmond) 2805 and 2806). Again, the executive entered into an agreement in order further to effectuate the policy of the statute together with other policies, rather than merely issuing the required proclamation provided for therein.

Agreements since the Tariff Act of 1922

The Tariff Act of 1922, generally, provided for the uniform application of the same rates of duty to imports from all countries, but in section 317 stated that the President, "when he finds that the public interest will be served thereby shall", by proclamation, provide for additional duties upon (and under certain circumstances he was even authorized to exclude) imports from countries (1) imposing unreasonable transit duties on articles wholly or in part of United States production, or (2) discriminating against the commerce of the United States with respect to "customs, tonnage, or port duty, fee, charge, exaction, classification, regulation, condition, restriction, or prohibition"

so as to place the commerce of the United States at a disadvantage compared with that of any foreign country (42 Stat. (pt. 1) 944 to 946, comparable provisions in sec. 338, Tariff Act of 1930, 46 Stat. (pt. 1) 704 to 706). It will be seen that these provisions authorize the President to take retaliatory action, as was the case under the Tariff Act of 1890 and the meat inspection act of the same year, but that they nowhere refer to the conclusion of agreements not to discriminate.

Concurrently with the enactment of the Tariff Act of 1922 there had been considerable thought developing that the unconditional most-favored-nation policy, with relatively few specific exceptions, should be adopted by the United States. Under this policy products of all countries would generally be treated equally, whereas under the conditional most-favored-nation policy previously adhered to special arrangements made with particular countries would not have to be extended to other countries. It was argued by Acting Chairman William F. Culbertson of the Tariff Commission that the strong provision in section 317 regarding retaliation against countries which failed to give equality of treatment implied a general policy of equal treatment and supported the change to the unconditional most-favored-nation approach (letter to Secretary of State Hughes, For. Rel. 1923, vol. I, p. 121 to 126). A reference along these lines was made by Secretary of State Hughes in a circular instruction relating to the change in most-favored-nation policy and the possible inclusion

of the unconditional clause in commercial treaties (ibid., 131-133).

Prior to the signature of any treaties containing the unconditional most-favored-nation clause as to customs duties, an agreement providing for such treatment with respect to "customs and other duties and charges affecting importations" was signed by Secretary of State Hughes with Brazilian Ambassador in 1923 (ibid., p. 461-463). In the negotiation of the agreement the United States had stated that the "most acceptable procedure for making clear the purpose of the two governments would be an exchange of notes by the terms of which they would declare they would accord" unconditional most-favored-nation treatment (ibid., 459-461). This agreement contained no provisions for its termination, and remained in effect until formally supplanted by the trade agreement of 1935 between the United States and Brazil (art. XII, 49 Stat. (pt. 2) 3820).

Notwithstanding the mandatory nature of section 317, when retaliation should be found to be in the public interest, or the fact that the discriminations by foreign governments referred to therein which would justify retaliatory action covered a broad range of subjects, including tonnage and port duties, classification, and restriction, Secretary Hughes undertook that the United States would not invoke this provision in return for an agreement by the other country that it would give nondiscriminatory treatment only as to "customs and other duties and charges affecting importations".

It appears that he departed considerably from the statutory plan for obtaining non-discriminatory treatment from other countries as to a wide range of matters through a threat of retaliation, by concluding an agreement to accomplish only one very important aspect of the purpose sought to be accomplished by the broader statutory plan.

In 1934 the Trade Agreements Act was enacted, expressly authorizing the President to enter into, and to put into effect, agreements providing for "modifications of existing duties and other import restrictions, or . . . additional import restrictions, or . . . continuance . . . of existing customs or excise treatment" (sec. 1, adding sec. 350, Tariff Act of 1930, 48 Stat. (pt. 1) 943, 944). This Act also expressly provided that "the proclaimed duties and other import restrictions shall apply to articles the growth, produce or manufacture of all foreign countries", except that the President may withdraw such extension in the case of countries discriminating against the commerce of the United States or undertaking other act or policies inconsistent with the purposes of the Trade Agreements Act. That Act, in addition, set forth procedures to be followed in concluding agreements entered into under it (sec. 4, ibid., 945).

Conclusion of the 1923 agreement with Brazil was followed, during the effectiveness of the Tariff Act of 1922, of the Tariff Act of 1930, and of both the latter and the Trade Agreements Act, by the conclusion of more than 30 agreements (other than agreements entered into pursuant to procedures

of the Trade Agreements Act) providing, in one form or another, for most-favored-nation treatment as to customs duties. Most of these contained commitments by the United States regarding trade control measures which the President was given no authority by section 317 (or sec. 338 of the 1930 Act) to utilize as means of retaliation. For example, an agreement signed with Greece in 1924 applied most-favored-nation treatment "to transit, warehousing and other facilities and the treatment of commercial travelers samples" and "with respect to commodities, valuations and quantities" in matters relating to "licensing or prohibitions of imports or exports" (4 Treaties (Trenwith) 4281 to 4283). In 1928 an agreement with Persia was authorized by Secretary of State Kellogg (For. Rel. 1928, vol. III, p. 718 and 719) which added to commitments comparable to those in the 1924 agreement with Greece assurances for nationals of the other party of "the fullest protection of the laws and authorities" and most-favored-nation treatment as to "the above mentioned subjects" (47 Stat. (pt. 2) 2644 to 2646). The 1930 agreement with Rumania, in addition to the usual most-favored-nation treatment for goods, provided for comparable treatment (1) in the case of "nationals and enterprises having juridical personality . . . for their persons and for property . . . in everything concerning establishment, the exercise of their commerce or industry as well as concerning taxes and other charges", and (2) in respect to "the vessels of each country in everything con-

cerning navigation in the ports and territorial waters" (ibid., 2594 to 2596).

In 1935 Secretary of State Hull signed an agreement with Czechoslovakia providing for most-favored-nation treatment with respect to "customs duties or charges of any kind . . . on or in connection with importation or exportation . . . the method of levying such duties or charges . . . all rules and formalities in connection with importation and exportation, and . . . all laws or regulations affecting the sale, taxation or use of imported articles" (49 Stat. (pt. 2) 3674 to 3679). It provided also that a fair share should be accorded to the commerce of the other country in "any form of control of foreign exchange" and in "any form of quantitative restriction or control of the importation or sale of any article".

A similar agreement was concluded with Greece two years later, specifying in considerable detail rules for application of most-favored-nation treatment in the case of restrictions on importation or on the control of exchange (53 Stat. (pt. 3) 2046 to 2057), and providing (1) that in the case of any "monopoly for the importation, production, or sale of a particular commodity", or of exclusive privileges granted to any agency for such action, "fair and equitable treatment" should be accorded to the commerce of the other country to the end that such monopoly or agency should "be influenced solely by those considerations, such as price, quality, marketability, and terms of sale, which would ordinarily be taken into account by a private com-

mercial enterprise", and (2) that each government "in the awarding of contracts for public works and generally in the purchasing of supplies" would not discriminate in favor of any third country (53 Stat. (pt. 3) 2046 to 2057).

In at least one case an agreement of this general nature, concluded with the Union of Soviet Socialist Republics in 1935, was construed by a court, the Court of Customs and Patent Appeals (*George E. Warren Corp.* vs. *United States*, 1938, 97 F. (2d) 105). Although the court found that the agreement did not include the right claimed by the importer, the opinion raised no question as to its status as a valid agreement.

The full legal status attributed to these agreements by the Executive is illustrated by the fact that in at least two instances in which legislation inconsistent with them was enacted, the Executive has either obtained a waiver from the other party or terminated the agreements in accordance with their terms, in spite of the fact that some of the agreements involved provided for their lapse in case of the enactment of inconsistent legislation. These cases involved discriminations in favor of the Philippines under the Philippine Trade Act of 1946 (secs. 201, 202, 60 Stat. (pt. 1) 143, 144; 4 Treaties (Trenwith) 4088 to 4090; 47 Stat. (pt. 2) 2582, 2583; 61 Stat. (pt. 3) 2441 to 2444), and discrimination against the Union of Soviet Socialist Republics and Soviet dominated or controlled countries under the Trade Agreements Extension Act of 1951 (sec. 5, 65 Stat. 73; 47 Stat. (pt. 2) 2594

to 2596; 48 Stat. (pt. 2) 1753 to 1756; 50 Stat. (pt. 2) 1619 to 1622; 56 Stat. (pt. 2) 1575, 1576; XXV Dept. of State Bull. 95, 550). Moreover, agreements of this nature with Bulgaria and Rumania were among the treaties and other agreements formally notified under the provisions of the peace treaties with those countries relative to the notification of agreements the United States desired "to keep in force or revive" (47 Stat. (pt. 2) 2594 to 2596; 48 Stat. (pt. 2) 1753 to 1756; 61 Stat. (pt. 2) 1956, 1803; XVIII Dept. of State Bull. 356, 357, 383, 384).

1927 Agreement with France

Section 315 of the Tariff Act of 1922 provided for the adjustment by the President of tariff rates in order to correspond with differences in costs of production, following investigation and recommendation by the Tariff Commission (42 Stat. (pt. 1) 941 to 943). It was also specified in section 318(a)(2) of the same Act that "it shall be the duty" of the Tariff Commission to ascertain costs of production "in the principal growing, producing or manufacturing centers of foreign countries . . . whenever in the opinion of the Commission such . . . costs . . . are necessary for comparison with costs . . . in the United States and can be reasonably ascertained" (ibid., 946). The French Government objected to the activities of the Tariff Commission representatives in making investigations in France, and in 1927 Secretary of State Kellogg instructed the Paris Embassy to agree, in

return for most-favored-nation treatment of a large number of American products, that "no investigation will henceforth be made by representatives of the American Government upon French territory involving the examination of books and private documents belonging to French producers, manufacturers, or businessmen", and the belief was expressed that "in lieu of these investigations the American Tariff Commission will be willing to take into due consideration any communication relating to cost of production of French products that may be sent to it by the French Government" (For. Rel. 1927, vol. II, p. 698-701). Thus, in return for tariff advantages for American exports, the Executive concluded an agreement limiting to some extent the methods by which the Tariff Commission would exercise its statutory functions under the Tariff Act of 1922.

Limitation on Pear Exports

At the time of the conclusion of the 1941 trade agreement with Argentina, an exchange of notes was signed which stated that, due to the "situation with respect to the marketing of fresh pears in the United States resulting principally from the temporary curtailment of customary exports", the Argentine government "would be disposed to limit total exports of Argentine fresh pears to the United States during the 1942 marketing season" (56 Stat. (pt. 2) 1758 and 1750). The Argentine government subsequently agreed to specific quantitative limitations during the first quarter and during the

whole year (Dept. of State file, 611.3531/2030; Foreign Crops and Markets, Dec. 29, 1941). At the time of this agreement pears were the subject of an export subsidy program (U. S. Tariff Commission, Summaries of Tariff Information, 1948, vol. 7, pt. 4, p. 158), interference with which by imports would have been a basis for imposition of restrictions under section 22 of the Agricultural Adjustment Act, as amended (49 Stat., pt. 1, 774 and 775; 54 Stat. (pt. 1) 17).

Thus, the United States had, seven years prior to the potato agreement, entered into a quite comparable agreement with Argentina for the limitations of exports during a particular season in preference to utilizing the more cumbersome procedure of section 22 to accomplish the same purpose (see also the agreements for seasonal limitation on the shipment of avocados from Cuba, which has been in effect since 1934, 49 Stat. (pt. 2) 3647 to 3649; 61 Stat. (pt. 4) 3710; U. S. Tariff Commission, Summaries of Tariff Inf. 1948, vol. 7, pt. 4, pp. 165 and 166).

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IN THE

Supreme Court of the United States

October Term, 1953

UNITED STATES OF AMERICA, PETITIONER

v.

GUY W. CAPPS, INC.

BRIEF FOR APPELLEE

W. R. Ashburn,
520 Board of Trade Building
Norfolk, Virginia
Counsel for Guy W. Capps, Inc.,
Appellee.

SUBJECT INDEX

	Page
Opinions Below	1
Jurisdiction	3
Statement of the Case	3
The Questions Presented	5
Argument	5
(1) The Trade Agreement	6
(2) Absence of a Cause of Action	11
(3) Defendant Breached No Contract Which Had Been Created by the Trade Agreement	19
(4) Plaintiff Sustained No Damages	22
Conclusion	26

TABLE OF CASES

	Page
Austin v. *Seligman*, 18 F. 522	18
Bain v. *United States*, 93 U. S. 642, 23 L. Ed. 997	12
Bryan Lumber & Supply Co. v. *Page*, 109 Conn. 256, 146 A. 293, 294	18
Buckley v. *Gray*, 110 Cal. 339, 52 Am. St. Rep. 88	18
Burnet v. *Brooks*, 288 U. S. 378	10
Campbell v. *Galeno Chemical Co.*, 281 U. S. 599	10
DeBaca v. *Kahn* (CA-New Mexico), 161 P. (2d) 630 at 633	21
Dollar Savings Bank v. *United States*, 19 Wall. (U. S.) 27, 22 L. Ed. 80	12
Dugan v. *United States*, 2 Wheat (U. S.) 172, 4 L. Ed. 363	11
German Alliance Ins. Co. v. *Home Water Supply Co.*, 226 U. S. 220	18
Helvering v. *Powers*, 293 U. S. 214 at 224	10
Manning v. *John Hancock Mut. Life Ins. Co.*, 100 U. S. 693, 697, 25 L. Ed. 761	22
Panama Refining Co. v. *Ryan*, 293 U. S. 388	10
Pennsylvania Steel Co. v. *N. Y. C. Ry. Co.*, 198 F. 721 at 749	17
Percival v. *Luce* (9th Cir. 1940), 114 F. 2d 774	18
Perillo v. *United States* (CA-2), 164 F. 2d 645 at 646	18
Public Service Commission of Pureto Rico v. *Havemeyer*, 296 U. S. 506	6
Re *United Cigar Stores Co.* (2nd Cir. 1934), 70 F. 2d 313 at 316	18
Robbins Drydock & Repair Co. v. *Flint*, 275 U. S. 393 at 397	18
Savings Bank v. *Ward*, 100 U. S. 195	18

TABLE OF CASES—Cont'd

Page

Story Parchment Co. v. *Patterson Parchment Paper Co.*, 282 U. S. 555 6

United States v. *Curtiss-Wright*, 299 U. S. 304 11

United States v. *LeRoy Dyal Co.*, 186 F. 2d 460, certiorari denied, 341 U. S. 926 19

United States v. *Standard Oil Co. of Calif.*, 332 U. S. 301, 91 L. Ed. 2067 12

Walling v. *General Industries Co.*, 330 U. S. 545 .. 6

Westland Oil Co. v. *Firestone Tire & Rubber Co.* (CA-8), 143 F. 2d 326 at 330 21

Youngstown Sheet & Tube Co. v. *Sawyer*, 343 U. S. 579 10

STATUTES AND SECONDARY AUTHORITIES

12 American Jurisprudence, Sec. 275, page 822, Note 17 17

12 American Jurisprudence, Sec. 273 through 293 .. 18

7 American and English Encyclopedia of Law and Procedure, p. 110 18

American Law Institute Contracts, Sec. 147 18

Williston on Contracts, Vol. 2, Sec. 402, p. 1157 .. 18

19 U. S. C. A. 1351 et seq 9

28 U. S. C. A. 1345 12

Tariff Act of 1930 9

No. 331

IN THE

Supreme Court of the United States

October Term, 1953

UNITED STATES OF AMERICA, PETITIONER

v.

GUY W. CAPPS, INC.

BRIEF FOR APPELLEE

Appellee, Guy W. Capps, Inc., opposes the award of Certiorari and asserts that the judgment for defendant is plainly right.

OPINIONS BELOW

When complaint was filed by United States of America in the District Court for the Eastern District of Virginia, defendant moved to dismiss for failure to state a claim upon which relief could be granted, on the grounds—

1. That action was brought by the United States in its sovereign capacity to recover damages alleged to have been sustained while in the exercise of govern-

mental powers, whereas Congress has created no such rights of action and none exists under federal law.

2. That the trade agreement asserted to have existed between the United States and Canada (R. 152) was invalid.

3. That the asserted contract between the Canadian exporter and the defendant American importer was no contract in law, and if it was plaintiff was no beneficiary thereof, and even so the complaint showed on its face that same had not been breached.

4. That the complaint showed on its face that plaintiff had been caused no damages by defendant's alleged breach of said contract.

This motion to dismiss for failure to state a claim was overruled in a memorandum opinion reported at 100 F. Supp. 30. On the trial, at the conclusion of the plaintiff's evidence, the District Court sustained defendant's motion for a directed verdict. The oral opinion, delivered from the bench, is not reported but will be found at R. 147-149. The District Court found as a fact (a) that defendant importer had not diverted or reconsigned the Canadian seed potatoes for table stock (R. 148), and (b) that there was no causal connection between defendant's sale of such potatoes and any damage to the United States (R. 149). The opinion of the United States Court of Appeals (R. 164-170) has been reported at 204 F. 2d 655. It ignored the factual determinations made by the District Court and sustained the judgment for defendant on the grounds (a) that the trade agreement was invalid, and (b) that there is no authorization in federal law for the institution of this action nor for a recovery therein (204 F. 2d 660).

JURISDICTION

The Jurisdiction of this Court is admitted.

STATEMENT OF THE CASE

The United States and Canada exchanged notes at November 23rd, 1948, by the terms of which Canada agreed that it would grant no export permits for the shipment of Canadian seed potatoes to the United States (1) unless for each shipment the Canadian exporter gave evidence (to Canada) that he had a firm order from a legitimate United States user of Canadian seed potatoes, and (2) unless the Canadian exporter's contract with the United States importer contained an assurance that the Canadian seed potatoes *would not be diverted or reconsigned for table stock purposes.* Neither the United States nor Canada understood the term "user" to be limited to a United States grower of potatoes who planted the Canadian seed, and both understood that such term extended to any importer who customarily dealt in seed potatoes for resale. Respondent is a Virginia corporation which had been importing and selling Canadian seed potatoes as a part of its general business for a long period of years (R. 132). It held a Department of Agriculture license to import and deal in such commodity (R. 132). It qualified under the trade agreement as a "user" of Canadian seed potatoes because it had been importing and selling this commodity for a long period of years (R. 133), and that it was a legitimate "user" of Canadian seed potatoes within the terms of the agreement (R. 132). Respondent was never a grower of potatoes as is stated in the petition at the bottom of page 6, and the record does not so indicate at any point.

In December, 1948, respondent purchased 48,544 one hundred pound bags of Canadian No. 1 seed potatoes from H. B. Willis, Inc., at Charlottetown, Prince Edward Island, directing their consignment to the port of Jacksonville, Florida. After this cargo was loaded on the S. S. Empire Gangway, respondent wired Willis that these seed potatoes were for planting in Florida and Georgia (Ex. 2, R. 151). Upon arrival of the cargo at Jacksonville, respondent sold it *in the usual course of trade* to Atlantic Commission Company as *Canadian No. 1 seed potatoes* (R. 153). Atlantic Commission Company customarily bought and dealt in Canadian seed potatoes (R. 54). To satisfy customer demand for Canadian seed potatoes respondent repurchased 10,000 bags from Atlantic Commission Company, and as an importer resold these 10,000 bags to other wholesalers customarily dealing in Canadian seed potatoes, in every instance as Canadian No. 1 seed potatoes (plaintiff's Ex. 4, R. 152). Of the 38,544 bags acquired by Atlantic Commission Company it sold 13,627 bags as Canandian No. 1 seed potatoes to the Great Atlantic & Pacific Tea Company (plaintiff's Ex. B, R. 159, and R. 157), and the remaining quantity as Canadian No. 1 seed potatoes to fruit and vegetable wholesalers in the southeastern area (R. 48), some of whom were known by Atlantic Commission Company to customarily sell seed potatoes to farmers for planting (R. 60). The Great Atlantic & Pacific Tea Company, buyer of 13,627 bags from Atlantic Commission Company, customarily sold seed potatoes in its retail stores to home gardeners and planters of small commercial acreage (R. 58).

THE QUESTIONS PRESENTED

We do not agree with appellant's statement of the questions presented on page 2 of the petition, as will appear from the argument in this brief. Petitioner's phraseology indulges in some unwarranted assumptions as to the effect of the decision of the United States Court of Appeals, and it ignores the factual findings by the District Court and the points upon which the District Court directed a verdict in favor of the defendant.

ARGUMENT

So avid was the United States Court of Appeals to reach the broad questions concerning (1) the validity and application of the Trade Agreement, and (2) whether a right of action for damages existed in favor of the United States if private parties acted in opposition to its objects, that such Court dismissed with scant courtesy the determinations of the District Court which had been made at the conclusion of the plaintiff's evidence (a) that the evidence failed to show that respondent had diverted or reconsigned the potatoes for use as table stock, and (b) even if such diversion or reconsignment had occurred plaintiff did not thereby sustain damage. On these primary points, it said only (204 F. 2d 658):

> "We have little difficulty in seeing in the evidence breach of contract on the part of defendant and damage resulting to the United States from the breach."

Despite its disposition to treat these important questions thus lightly, we submit that the conclusions of the District Court were eminently sound and they require the attention of this Court. *Walling* v. *General Industries Co.*, 330 U. S. 545; *Public Service Commission of Puerto Rico* v. *Havemeyer*, 296 U. S. 506; *Story Parchment Co.* v. *Patterson Parchment Paper Co.*, 282 U. S. 555.

We shall proceed to deal with the four defenses which respondent has presented in two courts, and the several branches of those defenses, in the following order:

1. The Trade Agreement;
2. Absence of a Cause of Action;
3. Defendant Breached No Contract Which Had Been Created by the Trade Agreement; and
4. Plaintiff Sustained No Damages.

(1) THE TRADE AGREEMENT—

In the petition for certiorari at page 11 it is said that the initial ruling below was that the President, without Congressional authorization, cannot consummate an international agreement which regulates foreign commerce because that field is reserved by the Constitution to Congress. Such assertion imports to the opinion of the Court of Appeals a somewhat broader scope than the record seems to justify. True it is that in discussing the question which had been posed, the Court said at 204 F. 2d 659:

"It is argued, however, that the validity of the executive agreement was not dependent upon the Act of Congress but was made pursuant to the inherent powers of the President under the Constitution. The answer is that while the President has certain inherent powers under the Constitution, such as the power pertaining to his position as Commander in Chief of Army and Navy and the power necessary to see that the laws are faithfully executed, the power to regulate interstate and foreign commerce is not among the powers incident to the Presidential office, but is expressly vested by the Constitution in the Congress."

However, in completing its discussion of the question that Court declared the genesis of its decision on the point at page 659 in the following language:

"We think that whatever the power of the Executive with respect to making executive trade agreements, regulating foreign commerce, in the absence of action by Congress it is clear that the Executive may not through entering into such agreement avoid complying with a regulation prescribed by Congress. Imports from a foreign country are foreign commerce subject to regulation, so far as this country is concerned, by Congress alone. The Executive may not by-pass Congressional limitations regulating such commerce by entering into an agreement with the foreign country that the regulation be exercised by that country through its control over exports. Even though the regulation prescribed by the executive agreement be more desirable than that prescribed by Congressional action, it is the latter which must be accepted as the expression of national policy."

With propriety, it may be here pointed out that the Trade Agreement in no sense related to "foreign commerce" as that term is commonly understood, that is to say, to the disposition of commodities produced in the United States outside of the boundaries of the country, but the concern of the United States in attempting to enter into such an agreement was directed solely to the quantity of potatoes arriving in this country (R. 78, 153, 156), a matter of internal concern and one with which the Congress had dealt in specific terms.

Of course, when the Congress authorized a support price for potatoes it was fully conscious of the fact that imports from Canada might deprive an equivalent quantity of American grown potatoes of a public market and thus result in their purchase by Commodity Credit Corporation (Petition for Certiorari page 4, and Sec. 22 Agricultural Adjustment Act), but the legislative determination was that if this should occur, nevertheless the executive branch should not place any quantitative limitations on imports except after (1) an investigation by the United States Tariff Commission, and (2) the quantitative limitation on commodities imported for consumption should not exceed 50% of the quantity imported for cunsumption during a prior representative period. Admittedly there was no pretense of compliance with any of the requirements prescribed in the statute.

Again, the Congress had taken cognizance of the propensity of the executive branch of the Government to enter into trade agreements which might adversely affect American importers with business similar to this

respondent, and by the Tariff Act of 1930 (19 U. S. C. A. 1351 et seq.), referred to in Section 22 of the Agricultural Adjustment Act of 1948, it had placed specific restrictions on the manner in which trade agreements of the nature of the one here under consideration may be entered into. It is there provided that before any such may be consummated reasonable public notice of the intention to negotiate such agreement with the foreign power shall be given, in order that any interested person may have the opportunity to present his views to the President or to such agency as the President may designate, and that before concluding such agreement the President shall request the Tariff Commission to make an investigation and report with its findings. It is there further provided that within 30 days after the making of any such agreement the President shall transmit to the Congress a copy of the agreement together with his reasons for the action taken. Obviously these statutory provisions were intended to reserve to Congress an opportunity for review of any such executive action and the last word as to the propriety thereof. The pertinent sections of the Tariff Act of 1930 are 1354, 1357(a) and (b), 1358, and 1359(a) and (b). Appellant admits that there was no compliance with any of such requirements.

The trade agreement evidenced by the exchange of notes dated November 23rd, 1948 was a clear attempt to circumvent these limitations and restrictions which had been prescribed by statutory law. In view of the statutory provisions for the manner in which imports could materially interfere with a program, or with the operations, of the Department of Agriculture can be quantitatively limited, it seems clear that there is no

independent authority for the Department of Agriculture (or the Department of State) to limit imports in any other manner. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579; *Panama Refining Co.* v. *Ryan*, 293 U. S. 388; *Helvering* v. *Powers*, 293 U. S. 214 at 224; *Campbell* v. *Galeno Chemical Co.*, 281 U. S. 599.

The subject is epitomized by Mr. Justice Jackson in his concurring opinion in *Youngstown Sheet & Tube Co.* v. *Sawyer*, supra, where he said:

> "When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system."

In no sense do we take issue with the assertion found at the bottom of page 11 and the top of page 12 of the petition that a national government is vested with all of the powers of government necessary to maintain an executive control of international relations, but this assertion and the cases cited by petitioner on that point beg the question at issue. No executive agreement was involved in *Burnet* v. *Brooks*, 288 U. S. 378, and this Court was there dealing solely with the question whether Congress had power to impose a tax on property within the United States which was owned by a foreign decedent at the time of his death. In

United States v. *Curtiss-Wright*, 299 U. S. 304, there was express congressional authority for a Presidential proclamation prohibiting the sale of arms in the United States to Bolivia, and there the subject matter related exclusively to the external affairs of the United States (see Headnote Section 47). In the *Belmot* and *Pink* cases, the United States was not a party litigant in its sovereign capacity but as a direct assignee of a right existing in the Soviet Union. The other cases there cited have no force on the question under consideration.

With the object of reducing the quantity of Canadian grown potatoes coming into the United States, there was no pretense of any compliance with the Congressional Acts, no investigation, no notice to the public, no opportunity to interested parties for a hearing, no Presidential proclamation, nor even any claim that the exchange of notes was ever brought to the attention of the President.

(2) Absence of a Cause of Action—

For the courts to entertain an action for damages, the plaintiff must assert a right of action arising under the common law or under some constitution or statute. The reported cases in which the United States has brought actions for damages have been exceedingly few, and have been limited to actions by the United States as a direct contracting party principal against another party principal on contracts which the United States was authorized by law to make. In those cases the United States does not occupy the position of a sovereign power but has the same position as a private party litigant. See *Dugan* v. *United States*, 2 Wheat

(U. S.) 172, 4 L. Ed. 363; *Dollar Savings Bank* v. *United States*, 19 Wall. (U. S.) 27, 22 L. Ed. 80; *Bain* v. *United States*, 93 U. S. 642, 23 L. Ed. 997. The United States as a sovereign cannot exact money from its citizens in any manner except as authorized by law and there is no law which authorizes this attempted exaction.

The statute referred to in the complaint, 28 U. S. C. 1345, does no more than confer jurisdiction on the District Courts as to actions brought by the United States when such actions are authorized by some other law. We do not dispute the principle that the United States "has as much right as any citizen to maintain an action to redress a violation of its contract rights", where the contract rights asserted are founded upon some statute or authority which empowers it to contract through an agent or representative. In the motion to dismiss, it was asserted in Paragraph 7 that for any monies expended by the Department of Agriculture in carrying out its price support program there is no warrant nor authority in law for their recovery by an action of this nature. The situation bears a close analogy to that presented in *United States* v. *Standard Oil Co. of Calif.*, 332 U. S. 301, 91 L. Ed. 2067, where the facts were that John Etzel, a soldier, had been hit and injured by a truck of the Standard Oil Company of California. He was hospitalized at Government expense and his soldier's pay continued during disability. The United States brought an action against the tortfeasor to recover the amounts expended for hospitalization and soldier's pay and for loss of Etzel's services. Such an action was not authorized by any Federal statute, and plaintiff sought to sustain it upon the theory that the common law liability of the tort-

feasor established a right of action in those who had paid out money by reason of his act. Recovery was refused, and in the opinion beginning at page 2075 of 91 L. Ed., it was said:

> "Moreover, as the Government recognizes for one phase of the argument but ignores for the other, we have not here simply a question of creating a new liability in the nature of a tort. For grounded though the argument is in analogies drawn from that field, the issue comes down in final consequence to a question of federal fiscal policy, coupled with considerations concerning the need for and appropriateness of means to be used in executing the policy sought to be established. The tort law analogy is brought forth, indeed, not to secure a new step forward in expanding the recognized area for applying settled principles of that law as such, or for creating new ones, it is advanced rather as the instrument for determining and establishing the federal fiscal and regulatory policies which the Government's executive arm thinks should prevail in a situation not covered by traditionally established liabilities.
>
> *Whatever the merits of the policy, its conversion into law is a proper subject for congressional action, not for any creative power of ours. Congress, not this Court, or the other federal courts, is the custodian of the national purse. By the same token it is the primary and most often exclusive arbiter of federal fiscal affairs. And these comprehend, as we have said, securing the treasury or the government against financial losses however inflicted, including requiring reimbursement for injuries creating them, as well as filling the treasury itself.*

However, Congress without doubt has been conscious throughout most of its history that the government constantly sustains losses through the

tortious or even criminal conduct of persons interfering with federal funds, property and relationships. We cannot assume that it has been ignorant that losses have long arisen from injuries inflicted on soliders such as occurred here. The case, therefore, is not one in which, as the Government argues, all that is involved is application of a 'well settled concept of legal liability to a new situation, where that new situation is in every respect similar to the old situation that originally gave rise to the concept'. Among others, one trouble with this is that the situation is not new, at any rate not so new that Congress can be presumed not to have known of it or to have acted in the light of that knowledge.

When Congress has thought it necessary to take steps to prevent interference with federal funds, property or relationships, it has taken positive action to that end. We think it would have done so here, if that had been its desire. This it still may do, if or when it so wishes.

In view of these considerations, exercise of judicial power to establish the new liability not only would be introducing within a field properly within Congress' control and as to a matter concerning which it has seen fit to take no action. To accept the challenge, making the liability effective in this case also would involve a possible element of surprise, in view of the settled contrary practice which action by Congress would avoid, not only here but in the many other cases we are told may be governed by the decision.

Finally, if the common law precedents relied on were more pertinent than they are to the total problem, particularly in view of its federal and especially its fiscal aspects, in none of the situations to which they apply was the question of liability or no liability within the power of one of

> the parties to the litigation to determine. In them the courts stood as arbiters between citizens, neither of whom could determine the outcome or the policy properly to be followed. Here the United States is the party plaintiff to the suit. And the United States has power at any time to create the liability. The only question is which organ of the Government is to make the determination that liability exists. That decision, for the reasons we have stated, is in this instance for the Congress, not for the courts. Until it acts to establish the liability, this Court and others should withhold creative touch." (Italics supplied).

On this same subject, appellant founds its position on the assertion at page 24 of the petition that "no specific authorization is required for the judical enforcement of a contractual right of the United States." Such a statement is acceptable as a broad generality, but it requires some scrutiny against the factual situation presented by this case. Assuming the validity of the Trade Agreement for discussion of this branch of the case, we find that the direct contracting parties were Canada and the United States. By its terms, Canada agreed (1) that it would grant export permits only to Canadian exporters who could give evidence that they had firm orders from legitimate United States users of Canadian seed potatoes, and (2) that such Canadian exporters would also be required (by Canada) to have included in any contract in which they might enter with a United States seed potato importer a clause in which the importer would give an assurance that the potatoes would not be diverted or reconsigned for table stock purposes (R. 153, 154). Here the purchase of Canadian No. 1 seed potatoes

was by respondent Guy W. Capps, Inc., from H. B. Willis, Inc. in Canada. The Canadian Government had not undertaken with the United States that it would exact any assurances from the American importer, but only that it would require the Canadian exporter to have included in his contract with the American importer a clause in which the American importer gave assurance against diversion or reconsignment for table stock purposes. It would seem that the contents of the telegram (Ex. 2, R. 151) was hardly a compliance by Canada with its second undertaking made to the United States, but if we assume that the Willis Company presented such telegram in order to obtain an export permit, and that the Canadian authorities accepted same as a compliance by the Canadian exporter with its requirements, then the result goes no further than a covenant by the American importer with the Canadian exporter that the commodities would not be diverted or reconsigned as table stock.

Petitioner views this representation from the respondent to the Willis Company, both being private parties customarily engaged in trade, as creating a contractual right of the United States. Our view is that according to established legal principles the transaction between these private parties did not establish a contractual right of the United States, since the United States had no direct contract with either the Canadian exporter or the American importer, and that the most favorable position which appellant can claim is that it is a beneficiary of this alleged contract term. As alleged in the complaint the contract was made in Canada (and certainly none existed until respondent's

telegram was delivered to the Canadian authorities, if it was so delivered), and under the law of that forum (and the English law) a third party beneficiary cannot maintain an action on a contract to which it is not a party even where the contractual instrument expressly provides that it shall have the power to sue thereon. *Pennsylvania Steel Co.* v. *N. Y. C. Ry. Co.*, 198 F. 721 at 749; 12 Am. Jur., Sec. 275, p. 822, Note 17.

If federal law governs in determining whether a non-party beneficiary may sue on a contract term, then that law is that an action cannot be maintained by the third party beneficiary unless (1) the part making the promise intended it to be for the sole benefit of the third party beneficiary, and (2) the contracting party making the promise and the contracting party to whom it was made intended to confer on the third party beneficiary the right to sue in damages for the breach of such promise; the federal law is further that these intentions will never be implied unless the nature of the transaction is such that the third party beneficiary asserting the cause of action is the only party interested in the promise, and the presumption is that the promise is only intended for the benefit of the party to whom it was made.

Here the record is devoid of any testimony to the effect that this respondent sent the telegram for the sole benefit of the United States, and it is likewise devoid of any testimony that the respondent and the Willis Company intended to confer on the United States the right to sue in damages for the breach of such promise. In the absence of testimony on these points, if we are permitted to indulge in assumptions the natural assumption from the record is that the

promise was for the benefit of the seller Willis Corporation and in order to permit it to consummate a transaction of sale for which it could not obtain an export permit in the absence of the telegram.

Under federal law, only those third party beneficiaries who fall within the category of "donee beneficiaries" or "creditor beneficiaries" can maintain an action, and "incidental beneficiaries" are not entitled to sue. Williston on Contracts, Vol. 2, Sec. 402, p. 1157. Here appellant is at most no more than an incidental beneficiary. See *Robbins Drydock & Repair Co.* v. *Flint*, 275 U. S. 393 at 397 bottom; *German Alliance Ins. Co.* v. *Home Water Supply Co.*, 226 U. S. 220; *Bryan Lumber & Supply Co.* v. *Page*, 109 Conn. 256, 146 A. 293, 294; *Percival* v. *Luce* (9th Cir. 1940), 114 F. 2d 774; *Re United Cigar Stores Co.* (2nd Cir. 1934), 70 F. 2d 313 at 316; *Pennsylvania Steel Co.* v. *N. Y. C. Ry. Co.*, 198 F. 721; *Austin* v. *Seligman*, 18 F. 522; 12 Am. Jur., Sec. 273 through 293; American Law Institute Contracts, Sec. 147.

If the posture of this action is ex delicto rather than ex contractu, then the following principle stated in 7 American and English Encyclopedia of Law and Procedure at page 110 is applicable:

> "It is well settled that a third party cannot maintain an action ex delicto for injuries resulting from a breach of contract between two other contracting parties, unless such third party sustains injuries from such breach for which he would have a right of action although no such contract had been made."

See also *Savings Bank* v. *Ward*, 100 U. S. 195; *Buckley* v. *Gray*, 110 Cal. 339, 52 Am. St. Rep. 88.

Petitioner asserts that the decision below is opposed to the principles laid down by the Court of Appeals for the Third Circuit in *United States* v. *LeRoy Dyal Co.*, 186 F. 2d 460, certiorari denied 341 U. S. 926, but it fails to distinguish the situation on the facts. In the Dyal case, the United States was a direct contracting party pursuant to a contract made by a governmental agency in pursuance of Congressional authority (186 F 2d 461).

(3) Defendant Breached No Contract Which Had Been Created by the Trade Agreement—

There was no diversion or reconsignment of the potatoes as table stock. Admittedly the time of the purchase by appellee was the time for planting of seed potatoes in Georgia and Florida and appellee customarily dealt in such seed in such season and in such area. Admittedly appellee sold the entire cargo as Canadian No. 1 seed potatoes to purchasers with whom it was previously accustomed to deal in a similar commodity in prior years. When appellee disposed of the cargo by sale, in the usual course of its business, it lost dominion and control over the commodity. In the District Court appellant never contended that it was appellee's duty to make certain that these seed potatoes were actually planted, but conceded that its only duty was not to divert or reconsign them as table stock. See Record 161, where Government counsel said:

> "The Government will rest upon two facts, that there was no restriction made upon that table use, and these dealers deal in table stock; the trade deals in table stock *as well as (in) seed potatoes.*" (Italics supplied).

If, as admitted in this case, the purchasers from Guy W. Capps, Inc., customarily dealt in seed potatoes as well as in table stock, how can it be successfully argued that a bare sale of Canadian No. 1 seed potatoes *as such* to those purchasers, supports the inference that the sale was a diversion or reconsignment for table stock as an immediate inference from the fact proved?

The fact proved was a resale by appellee to Atlantic Commission Company. Atlantic Commission Company was a dealer for resale in potatoes suitable for immediate eating and those suitable for immediate planting. Because it customarily bought potatoes suitable for immediate eating the appellant sought to draw the presumption that appellee's sale to it was a diversion or reconsignment for table stock, and it sought to draw this presumption on the theory that appellee knew or should have known that the Canadian No. 1 seed potatoes *might* thereafter be resold and consumed as food. From the circumstances (assumed by appellant) that appellee knew or should have known that the Canadian No. 1 seed potatoes might be resold by Atlantic Commission Company and ultimately consumed as food, appellant contends that appellee should be held to have itself intended that the Canadian No. 1 seed potatoes should be consumed as food.

Those contentions are contrary to established legal principles. In *Manning* v. *Insurance Co.*, 100 U. S. 683, it is held:

> "(a) It is error to submit to the jury to find a fact of which there is no competent evidence;
>
> (b) The only presumptions of fact which the law recognizes are immediate inferences from the facts proved." (Headnotes 2 and 3).

At page 698, in its opinion, the Court said:

"Remarking upon this subject in United States v. Ross (92 U. S. 281, 284), we said: 'Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved, and not themselves be presumed.' Referring to the rule laid down in Starkie on Evidence, page 80, we added: 'It is upon this principle that courts are daily called upon to exclude evidence as too remote for the consideration of the jury. The law requires an open and visible connection between the principal or evidentiary facts and the deductions from them, and does not permit a decision to be made on remote inferences. Best on Evid. 95. A presumption which a jury may make is not a circumstance in proof, and it is not, therefore, a legitimate foundation for a presumption. There is no open and visible connection between the fact out of which the first presumption arises and the fact sought to be established by the dependent presumption. Douglass v. Mitchell, 35 Pa. St. 440'."

See also *Westland Oil Co.* v. *Firestone Tire & Rubber Co.* (CA-8), 143 F. 2d 326 at 330; *Perillo* v. *United States* (CA-2), 164 F. 2d 645 at 646; *DeBaca* v. *Kahn* (CA-New Mexico), 161 P. (2d) 630 at 633, where in its opinion the Court said:

"The rights of the parties litigant may not be determined and adjusted upon mere inferences drawn from others. But, before the courts are authorized to act, there must be some evidence in the record of such tangible nature as would authorize the lower court whose duty it is to pass upon the facts to do so without basing its findings upon surmise, speculation or mere inferences."

In *Manning* v. *John Hancock Mut. Life Ins. Co.*, 100 U. S. 693, 697, 25 L. Ed. 761, it was said:

> "We do not question that a jury may be allowed to presume the existence of a fact in some cases from the existence of other facts which have been proved. But the presumed fact must have an immediate connection with or relation to the established fact from which it is inferred. If it has not, it is regarded as too remote. The only presumptions of fact which the law recognizes are immediate inferences from facts proved."

Respondent did no more than sell a recognized commodity in the previously established trade channels for disposition of such commodity, and in the District Court there was no testimony for appellant sufficient to show that a single bag of this cargo was ultimately eaten rather than planted.

(4) PLAINTIFF SUSTAINED NO DAMAGES—

The basis on which it is claimed that the United States has been damaged is (a) that these 48,544 bags of potatoes found their way to American tables shortly after their arrival at Jacksonville, with (b) the consequent result that the Department of Agriculture was compelled to buy an equal quantity from "eligible" American growers in order to comply with its contractual obligation to those growers whom it is said were thus deprived of a public market for 48,544 bags. In the District Court the Government's contention was pin-pointed (R. 125, 126, 127) by questions to Department of Agricultural witness Grange on the part of counsel and the Court as follows:

"Q. Well, suppose 48,000 bags were planted and 544 bags were eaten. Would it be your position that the only additional quantity the Government had to buy in consequence of which it suffered damage was the 544 bags?"

A. My position would be, our only claim would be on the 544 bags.

Q. It is true, then, that your claim depends as to a monetary amount, bag for bag, on what was used up by eating and what was used up by planting, corresponding to your theory of your claim?"

"THE COURT: That is the entire extent of your injury, that is for each potato that came in on the Gangway and was used for table purposes? Your view is that the Government suffered to that extent and only to that extent?"

THE WITNESS: I agree with that, Your Honor, yes, sir."

There was absolutely no testimony for the Government that any American grown potatoes which had been produced by "eligible" American growers were deprived of a market (displaced) by this quantity of 48,544 bags. In 1948 (and throughout the Price Support Program) "eligible" growers were those who voluntarily contracted with the Department of Agriculture for the price support umbrella, and they accounted for approximately 80% of the production within the country (R. 107), whereas 20% of the production within the country went to market unsupported by the Program. To the extent to which they were sold to the public the 20% displaced an equivalent quantity which the Government was obligated to buy, and there is no evidence to show whether potatoes imported from

Canada displaced a portion of the 80% grown in America which the Government was committed to buy or a portion of the 20% which was grown in America which the Government was not committed to buy.

Additionally, by the terms of the Agricultural Adjustment Act, the Department of Agriculture could have had no undischarged commitment at June 9th, 1949 for the American crop grown in 1948 because the entire 1948 crop had been harvested prior to that date. Its commitment for the crop grown in America during 1949 had not been made (R. 109). The Trade Agreement could have no effect on the 1949 crop grown in America because such Agreement expired according to its terms at June 20th, 1949 (R. 136).

Although the Court of Appeals said in its opinion "We have little difficulty in seeing in the evidence . . . damage resulting to the United States from the breach . . . ", we respectfully submit that such Court never gave any careful consideration to the proof relating to damages and that the conclusion reached by the District Court on this subject is irrefutable. As our final representation on this subject, we urge that it is conclusive against appellant's contention that the United States was damaged if this cargo of potatoes imported by Guy W. Capps, Inc. was eaten rather than ultimately planted as seed, because if these 48,544 bags ever displaced any American grown potatoes (as to which there is no proof) they displaced an equivalent quantity of American grown potatoes whether eaten immediately after their arrival in this country or planted as seed, and disbursements by the Department of Agriculture by reason of their importation was in like amount in either event. The testimony of appellant's

witness Grange at R. 112, now here set forth for the convenience of the Court, is conclusive on the question:

> "Q. Isn't this also true, if those 48,544 bags were every one planted, did they not displace an equal quantity of American grown seed potatoes?
>
> A. Yes, sir."

The displacement, causing additional purchases by the Department of Agriculture, if any ever occurred, was by reason of entry of potatoes into the United States and not by reason of the use of such potatoes after their arrival.

On this subject, *United States* v. *LeRoy Dyal Co.*, 186 F. (2d) 460 (cited by appellant at page 25 of the petition to support the contention that the courts will enforce a contractual right of the United States) is of considerable interest. There, the defendant contracted directly in writing with a Government agency to purchase potatoes in its behalf under the Price Support Program of 1947, and to buy in behalf of the United States only potatoes produced by eligible growers. The Government agency inserted as a contract term a provision for payment of $3.00 per hundredweight as liquidated damages if the dealer purchased potatoes from an ineligible dealer. Unwittingly, the defendant contracting party purchased 367,400 pounds from a farmer who was not an eligible grower, with the result that monies appropriated as a subsidy for eligible growers were thereby paid to this ineligible grower. The Court properly recognized in that action that the United States could recover no damages in the absence of a contract provision for liquidated damages, and the

underlying question was whether the contract provision for liquidated damages could be enforced in the absence of specific proof that damages had occurred.

CONCLUSION

For the reasons stated herein, we feel that the judgment below in favor of the respondent is manifestly right, that no certiorari should be awarded, and that if this Court shall consent to review such judgment it should be affirmed.

Respectfully submitted,

W. R. ASHBURN,
Counsel for Guy W. Capps, Inc.,
Respondent.

520 Board of Trade Building
Norfolk, Virginia

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No. 14

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA, *Petitioner*

v.

GUY W. CAPPS, INC.

REPLY BRIEF FOR APPELLEE

W. R. ASHBURN,
520 Board of Trade Building
Norfolk, Virginia

Counsel for Guy W. Capps, Inc.,
Appellee.

SUBJECT INDEX

	Page
Preliminary	1
I. Misstatements of Fact and Arguments on Improper Assumptions	3
II. The Validity of the Potato Agreement as the Foundation for This Action	7
III. There is No Cause of Action in Favor of the United States	11
IV. Appellee Breached No Contract, and Appellant Sustained No Damages	12

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REPLY BRIEF FOR APPELLEE

PRELIMINARY

When appellant filed its petition for certiorari, this appellee considered that the application probably would be granted because of the Fourth Circuit's election to decide the case on the basis of (1) the invalidity of the trade agreement, and (2) the absence of a cause of action in the United States (204 F. 2d 655). Accordingly, in its opening brief, appellee decided to incorporate its entire position on the whole case, with no thought that any additional brief would be thereafter filed. Its decision to do so was motivated by the further facts that Guy W. Capps, the moving power in the affairs of the corporation which bore his name, had

died in 1950, the appellee corporation had closed the conduct of active business at August 31st, 1950, and its counsel had retired from law practice in 1953.

However, since the award of certiorari, appellant has filed a brief of 75 pages with appendices of 21 pages, and it has devoted approximately 58 printed pages to an attempt to support the initial validity of this trade agreement which expired at June 20th, 1949, and the applicability of the terms thereof to enable the United States to collect money damages from the appellee, where to the knowledge of the Government appellee has no assets which would discharge even a small part of the liability which has been asserted if that liability is finally established. The reason for such an effort must lie in the continuing determination of the Executive branch of our Government to assert and maintain for itself powers superior to the Constitution and laws, and powers which relate not only to the external affairs of the nation but as well to its internal affairs. Surely, it cannot be successfully said that the subject of what quantities of any commodity may be imported into the country in any given time is a subject which relates to more than the internal affairs of the country, nor can it be successfully said that this is a subject which is without the field of Congressional action and is inherent in the President by virtue of his office.

Of necessity, the attitude of counsel in any law suit is measured in large degree by practical considerations; and in this cause, where appellee is no more than a corporate shell with asset values which are required in principal part to satisfy income taxes accruing from the last period of its business activity, and due the Treasury Department, there is little incentive toward that depth

of research or degree of effort which would be in order if appellee's continuance as a business enterprise depended upon the outcome. Certainly there is no desire by appellee's counsel to establish a binding precedent for the benefit of future litigants.

The business career of the corporate appellee is ended, and the legal career of its attorney is likewise ended, so that the only forces which remain in existence to justify the filing of any reply brief are (1) consideration for the efforts and the wisdom of those jurists who have reached decisions favorable to the appellee in the courts below, and (2) the concern which any lawyer feels when assaults are made on the verity of what have been heretofore regarded as legal principles firmly established in the public interest.

In this reply we will content ourselves with correcting misstatements of fact upon which appellant has predicated some of its most weighty arguments, and in pointing up the precise questions which are before this Court for decision, so that the final conclusion will not be marred by any misconceptions of what those questions actually are.

I.

Misstatements of Fact and Arguments on Improper Assumptions.

Under the subcaption "Respondent's Potato Imports" at page 6 of the brief for appellant, it is said that respondent is a Virginia corporation which *grows* and ships potatoes and vegetables on the Eastern Seaboard of the United States. The Capps corporation was never a *grower* of potatoes, or other vegetables,

and there is no testimony that it was. On the contrary, prior to 1948 appellee had been importing and selling Canadian seed potatoes as a part of its general business for a long period of years (R. 132); it was a legitimate American *user* (for resale) of Canadian seed potatoes within the meaning of the term "user" as such term is set forth in the trade agreement (R. 132); and it held a Department of Agriculture license to import Canadian seed potatoes and resell them (R. 132).

At page 7 of the brief for appellant, it is said that actually only one-fifth of the potatoes imported on the S. S. Gangway were of a type suitable for planting in Florida, and substantially the same assertion is repeated at page 17 and at pages 71 and 72 in support of the arguments which appellant attempts to make at those points. The basis for the assertion of unsuitability as to the major portion of the cargo imported on the S. S. Gangway is that about three-fifths of such cargo was Katahdin potatoes, one-fifth Sebago potatoes, nearly one-fifth Cobbler potatoes, and 500 bags were Green Mountain potatoes (R. 101), whereas the Government witness testified at pages 99 and 100 that in the preceding crop year of all of the different varieties of potatoes planted in Florida the three principal varieties were Bliss Triumph, Sebagos, and Pontiacs. There was no Government contention nor testimony that Katahdins (three-fifths of cargo), Cobblers and Green Mountains were not planted in Florida in very substantial quantities. Ordinarily, the variety to be planted is a matter of selection by the individual farmer, and since apparently there are plantings of the varieties contained in this cargo in Florida every year, how can it properly be said that such varieties are "unsuitable.?'

At the bottom of page 7 of the brief for appellant, it is said that the Capps corporation sold all but 10,000 bags of the cargo to the Atlantic Commission Company. Actually, the Capps corporation sold all of the cargo to the Atlantic Commission Company and repurchased 10,000 bags to meet the demands of its established customers to whom it customarily marketed seed potatoes.

At page 8 of the brief for appellant, the following statement appears:

> "The evidence tends to indicate that most, if not all, of the potatoes were sold to retail establishments as table stock potatoes (R. 22-38, 165), and that four-fifths of the potatoes remained in Florida."

We have no hesitancy in asserting that there is not the slightest foundation in the Record for any such statements of fact. Every one of the invoices from the Capps corporation were subject to Government inspection, and every one of those invoices showed that the potatoes in this cargo were sold as Canadian No. 1 Seed potatoes. Neither were the sales to retail establishments, but in substantial quantities to produce dealers who customarily sold seed potatoes (R. 160 and 161). As to those which Atlantic Commission Company sold to Great Atlantic & Pacific Tea Company, the appellant wholly fails to mention the fact that A. & P. Stores customarily sell seed potatoes and other vegetables suitable for planting to home gardners (R. 57, 58, 59). So far as we are able to find, there is no evidence that four-fifths of the potatoes remained in Florida, nor is there any evidence as to their ultimate disposition as to what quantities were eaten and what quantities were planted.

In the brief for appellant at page 61 it is said:

> "It can be shown, in this very instance, that the breach of contract cost the Government a substantial sum of money (supra pp. 8-9; infra pp. 71-75)."

Appellant chooses to ignore that the place for such a showing was in the District Court; that such a showing would be the measure of the damages which the Government sustained; that the Government failed to show that the so-called breach of contract cost it a single penny; and that the District Court found as a fact that the Government had failed to show that the so-called breach of contract cost it a single penny.

At page 65 of the brief for appellant, the assertion is made:

> "Respondent itself does not deny that its telegram was of a contractual character; it merely questions whether it contained a promise enforceable by the United States as a third party."

The appellee has attempted to set forth very clearly at pages 16 and 17 of its initial brief that according to its belief the purpose of the telegram was not to make a promise to the exporter H. B. Willis Co., Inc., but to allow such exporter to get customs clearance for shipment of a cargo which had already been sold.

At page 71 of the brief for appellant, it is asserted that the evidence discloses that the Atlantic Commission Company purchased the potatoes, not for seed purposes but as "potatoes" (R. 62) obviously to be sold for food. On the contrary, the evidence discloses that every sale by the Capps corporation was as

Canadian No. 1 Seed potatoes, and every resale by Atlantic Commission Company was as Canadian No. 1 Seed potatoes, and there is nothing to justify the inference that any successive purchaser bought any part of the potatoes in order to sell them as food, unless one can found such an inference on the fact that some of the purchasers of these potatoes as a part of their general business also sold some potatoes for food.

II.

The Validity of the Potato Agreement as the Foundation for this Action.

The first position taken by appellant is that Section 22 of the Agricultural Adjustment Act of 1948 is not in conflict with the arrangment created by the Potato Agreement, and that such Section authorized the making of the Agreement.

As to whether there is conflict, the creation of Government subsidy for American grown potatoes was by the enactment of the Agricultural Adjustment Act. The Congress there decided that there should be a price support for those American growers who would contract with the Department of Agriculture not to increase the quantity of their prior acreage devoted to potatoes, and who would contract upon certain other conditions. The producers of about 80% of the total quantity of potatoes grown in the United States in 1948 elected to so contract and to have the benefit of price support, whereas the growers of about 20% of the total elected not to contract and to dispose of their own production at their own risk (R. 84, 85). In devising and authorizing the program, the Congress recogniz-

ed that it was customary for a quantity of potatoes, particularly for seed purposes, to be imported into the United States, and that by the measure of such quantity as was in fact imported the quantity grown in the United States might be deprived of a public market, and by reason of that deprivation qualify for compulsory purchase by Commodity Credit Corporation (Petition for Certiorari, page 4; and Section 22, Agricultural Adjustment Act.) Nevertheless, with this knowledge and recognition, the Congress was willing for the United States to purchase these American grown potatoes which were thus deprived of a public market because it expressly provided that before the Government should place any restriction or limitation on the quantity imported from Canada there should be (1) an investigation by the United States Tariff Commission, and (2) the quantitative limitation on commodities imported for consumption should not exceed 50% of the quantity imported during a prior representative period. In 1948 the quantity grown in America was the record crop of all time, and it extended to 454,700,000 bushels, or some 44,700,000 more than the average (R. 73). By the fall of that year the Department of Agriculture took the position, in effect, that although Congress had been willing for the United States Government to bear the burden of the additional quantities which it must purchase by reason of these importations, yet it thought that its judgment was better than the judgment of the Congress on that subject, and that although the Congress had a great concern for the preservation of the established business of importers as such business might be disrupted by a restriction or limitation on importations from Canada, the Department had no such concern, therefore, it would proceed

by an agreement with Canada to restrict importations without any regard to the damage which the import business might thus sustain, and without any regard to the course which the Congress had prescribed for the attainment of the object of limiting importations, and without any regard to the Congressional review of the determination to restrict imports for which the Act provides. It so decided, despite the fact that its sole source of power to deal with the subject emanated from the Agricultural Adjustment Act. By that measure, the Potato (Trade) Agreement was in conflict with the statute. The method adopted to restrict and limit the imports was to get Canada to agree not to issue export permits for any potatoes other than seed potatoes, and none for seed potatoes unless the United States importer would furnish the Canadian exporter with assurances that the shipment would "not be diverted or re-consigned for table stock."

Appellant next says that Section 22 of the Agricultural Adjustmetn Act authorized the making of "this type of agreement." It authorized the making of a trade agreement having as its purpose the restriction or limitation of imports, but only through the course and to the extent specified in the statute. In Section 22(f), it is provided that if the administrative mechanism provided by the Congress for restricting or limiting importations is followed through the course and to the extent which Congress has specified, nevertheless the accomplishment of restricting or limiting administratively under such a course should not be enforced in contravention of any treaty or other international agreement to which the United States was then or thereafter might become a party. Clearly this was no

more than an authorization to the Executive Branch to agree with some foreign power that any limitation or restriction which might be established administratively by following the course which Congress had provided would not be enforced against importations into the United States from such foreign power.

How is it possible to distort the plain meaning of the language used in Section 22(f) as support for the contention that such language justified a restriction or limitation by a course differing from the one which the Congress had prescribed?

At page 31 of the brief for appellant it is urged on this Court that the Potato Agreement should be sustained because the course thereby established was a botter course than the one which Congress had prescribed. This is a familiar assertion frequently made by an Executive seeking to substitute his judgment for the judgment of the Congress. It is the same assertion which was presented on behalf of the Government in justification for seizure of the steel plants. Our answer is that such an appeal should be addressed to the Congress and not to this Court.

III.

There Is No Cause of Action In Favor of the United States.

This point is dealt with at some length at pages 11 to 19 of the opening brief for appellee. In its opinion on the subject, the Fourth Circuit said:

> "We think, also, that no action can be maintained by the Government to recover damages on account of what is essentially a breach of a trade relationship in the absence of express authorization by Congress. The power to regulate foreign commerce is vested in Congress, not in the Executive or the Courts; and the Executive may not exercise the power by entering into Executive Agreements and suing in the courts for damages resulting from breaches of contracts made on the basis of trade agreements."

As further elaboration, we assert that the fact of sovereignty does not in law establish a cause of action for the collection of money in favor of this Government against any of its citizens, and no Executive can create such a cause of action by any act or proclamation originating with him. Certainly, the Potato Agreement if valid was of no greater dignity nor force than a statute would be, and we submt that it could not be successfully contended, for instance, that if the Defense Production Act of 1950 contained a provision for criminal penalties for violation of price ceilings established by the Executive or his representative, but no provision for the collection of overcharges, yet a civil cause of action for the collection of such overcharges

would still exist in favor of the United States. By way of further illustration, let us suppose that the Potato Agreement followed the course prescribed by the Congress for the imposition of a limitation on imports, and to implement such established limitation contained a proviso that Canada would not grant an export permit for any potatoes unless the United States importer held a Department of Agriculture permit to import that particular shipment; that the United States importer made a false representation to the Canadian exporter that he had such Department of Agriculture permit; and that on the faith of such representation the Canadian authorities granted the export permit. Could it be successfully contended in such a situation that a civil action for damages would lie in favor of the United States against the American importer?

IV.

Appellee Breached No Contract, and Appellant Sustained No Damages.

On these important questions, the Court of Appeals for the Fourth Circuit in its opinion said only this:

> "On these facts, we think that judgment was properly entered for the defendant, but for reasons other than those given by the District Court. We have little difficulty in seeing in the evidence breach of contract on the part of defendant and damage resulting to the United States from the breach."

We have attempted to deal with the first question rather carefully at pages 19 to 22 of the opening brief

for appellee, and need add here only a portion of the opinion delivered by the District Court from the bench, contained in the Record beginning at the bottom of page 147 and continuing on page 148:

> "The expression constituting that stipulation is that certified seed potatoes loaded on the S. S. Gangway are for planting in Florida and Georgia. Now, assuming that the Court is correct in holding that that stipulation is an agreement within the meaning of the Executive Treaty or an assurance, as it is called in the Executive Treaty, to the effect that the potatoes would not be diverted or reconsigned for table stock purposes—I say assuming that the Court is correct in holding that this provision is an assurance, *there is no proof here sufficient to go to the jury that there has been such a diversion or reconsignment, or that there has been a lack of diligence or care on the part of this defendant to see to it that its assurance was carried out.*
>
> In the first place, the only diversion or reconsignment was from the defendant to the Atlantic Commission Company. Now that was not a diversion or reconsignment for table stock purposes. Nor does it evidence any want of care on the part of the defendant to see that the assurance was kept, because the evidence shows that this defendant had from year to year sold to Atlantic, potatoes exclusively for seed purposes. The evidence does not justify or would not justify the jury in drawing a conclusion that it was a reckless abandonment by the defendant of its obligation to the use of these potatoes because the defendant had the right to rely upon its previous experiences.
>
> But going further, and assuming that it was incumbent upon the defendant to follow up and see that this reconsignment did not lead to the

use of the potatoes for table stock purposes, we find that the A & P, to whom Atlantic sold, did sell seed potatoes. It is true that it was not its entire trade in potatoes, but it did sell a large amount, described as its secondary function, for seed purposes, and the other sales by Atlantic to wholesalers or to the trade, as it is spoken of, were to firms which used potatoes for seed purposes or disposed of them for seed purposes, so that the sales by the defendant here were equally consistent with the compliance as with the violation of the assurance." (Italics supplied).

On the second question, in the brief for appellant at page 73, the Government attempts to sustain its position by asserting that once the fact of injury has been established respondent cannot escape liability on the ground that the exact amount of the damages was uncertain, or ascertainable only by inferential proof. Appellant can take no comfort from this principle for here the "fact of injury" was never established. In Footnote 106 at the bottom of page 172, appellant says that if the entire cargo on the S. S. Gangway had been planted and none of it had been eaten, then and in that event "compliance with the contract would not have caused the diversion of any American seed potatoes to the table stock market"; but diversion of American seed potatoes to the table stock market is not the foundation which would occasion a financial loss to the United States. The question whether the United States has sustained any damages depends on whether it has been compelled to buy an additional quantity of potatoes above the quantity which it would have bought if this cargo was planted rather than eaten. To us it seems incontrovertible that whether eaten or

planted, if these potatoes displaced any United States grown potatoes in the public market they displaced an equivalent quantity in either event. If all were planted, clearly they displaced an equivalent quantity of United States grown potatoes which were suitable for planting; if all were eaten, they displaced an equivalent quantity of United States grown potatoes which were suitable for eating and probably for planting. Testimony for the Government quoted at page 25 of the opening brief for appellee would seem to be conclusive on this point.

Respectfully submitted,

W. R. Ashburn,
Counsel for Guy W. Capps, Inc.,
Appellee.

520 Board of Trade Building
Norfolk, Virginia